OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 7

to

The Legislative Assembly
of British Columbia

THE SHOAL ISLAND CASE

Legislative Assembly
Province of British Columbia

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February 16, 1984

The Honourable K. Walter Davidson
Speaker of the Legislative Assembly
Province of British Columbia
Parliament Buildings
Victoria, B.C.

Mr. Speaker:

I have the honour to submit herewith a special report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report concerns a complaint I received from a number of logging contractors about the Ministry of Forests' scaling procedures at Shoal Island. It describes my investigation, my conclusions, and the recommendations I made to the Ministry of Forests following this investigation. I have attached in the appendices to this report copies of my correspondence with the Ministry of Forests.

Respectfully yours,

Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

SPECIAL REPORT #7

TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

AN INVESTIGATION BY THE OMBUDSMAN INTO A COMPLAINT ABOUT MINISTRY OF FORESTS' SCALING PROCEDURES AT SHOAL ISLAND, BRITISH COLUMBIA

February 16, 1984

TABLE OF CONTENTS

I	INTRODUCTION	1
II	A BRIEF HISTORY OF THE PROBLEM	5
III	MY INVESTIGATION AND CONCLUSIONS	12
IV	MY RECOMMENDATIONS	25

INTRODUCTION

Timber is one of British Columbia's most important and most valuable resources, and the Ministry of Forests is charged with the responsibility of ensuring that the forest resource is managed for the benefit of the Province. As part of that responsibility, the Ministry is required to determine the volume of Crown timber removed from the Province's forests, and to collect stumpage or royalty payments from those who harvest and use Crown timber.

But the Ministry of Forests has failed in its duties. In this report I draw to your attention a situation in which the Ministry's failure has resulted not only in significant financial losses for a number of small logging contractors, but also in millions of dollars of lost revenue owing to the Province for the use of Crown timber. Briefly put, the Ministry did not scale large amounts of Crown timber as required by the Forest Act - that is, it did not determine the volume of timber removed from the Province's forests. Since the timber was not scaled, the company benefitting from the use of Crown timber has never been billed, and millions of dollars have gone uncollected.

While the primary figures in this arrangement are the Ministry of Forests and the company to which the Ministry has granted timber harvesting rights, other parties are also involved. It is fairly common practice for the company which has obtained timber harvesting rights to contract

out at least part of the harvesting operations to smaller logging companies. It is also common practice for the Ministry's scale, which stands as the official record of the volume of timber removed from the Province's forests to form the basis on which these logging contractors are paid.

An unfortunate consequence of this arrangement is that when the Ministry's scaling is deficient, the contractors suffer financially. They go out and work in the woods, logging the timber and removing it to a specified location for scaling. But if that timber is not scaled, the contractors are not paid for their work.

That is what happened in this situation. During a three and a half year period, six logging companies worked under contract to British Columbia Forest Products Limited (BCFP). They logged Crown timber to which the Ministry had given BCFP the harvesting rights, and they delivered the logs to BCFP's sorting grounds at Shoal Island.

There, Ministry of Forests scalers were responsible for scaling the loads of logs. They did scale much of the timber delivered to the site; but they did not scale a significant proportion of the timber. It is estimated that the Ministry scalers failed to scale 226 064 cubic metres of the Crown timber which the contractors harvested and delivered. For the contractors this failure has been devastating. They estimate their

total loss at between $4.5 and $6.3 million; they incurred labour and equipment costs in harvesting that timber, but they have received no revenue in return. Most of them are now on the very brink of financial disaster.

The damage to the public purse is a bit more difficult to estimate. Unpaid stumpage fees on the 226 064 cubic metres would amount to between $1.3 and $2 million, but the total amount uncollected by the Ministry could be much higher for two reasons: first, BCFP employees also harvested Crown timber in addition to that harvested by the contractors, and I have been unable to determine what proportion of the BCFP harvest was unscaled; and second, there were five other locations in British Columbia in which the same deficient scaling procedures were employed by the Ministry, and I have been unable to determine what proportion of the Crown timber delivered to these locations also went unscaled. Whatever the total amount, it is clearly not small, and I would not have thought that the Province's finances were such that it could afford to forego the collection of this revenue.

Crown timber - a public resource - has been removed from the Province's forests. The contractors have not been paid for their work logging and removing the timber, and the Province has not been paid its fees for the use of that timber. In essence, Crown timber has been harvested and delivered to BCFP and possibly other large forest products companies - for use in their mills, or for export or whatever - free of charge.

The Ministry of Forests has within its authority the means to correct this situation. The Forest Act includes a provision which allows the Ministry to estimate volumes of unscaled Crown timber, and to invoice on the basis of that estimate. This would result in a new scale return which would serve two purposes: it would provide a means by which the contractors could obtain payment from BCFP, and it would initiate the process under which the unpaid stumpage fees could be collected. But the Ministry has refused to take this or any other corrective action.

This problem occurred between 1978 and 1981. The contractors have been attempting to obtain a rectification of the matter since 1981. They have met with BCFP and with independent scalers. Within the Ministry they have met with the District Manager, the Regional Manager, the Superintendent of Scaling, the Assistant Deputy Minister, the Deputy Minister, and the Minister. They have commissioned an independent forester to prepare an estimate of the unscaled volume of timber, and they have submitted briefs to Cabinet Ministers. It is now 1984; the Ministry of Forests acknowledges the existence of the problem, but has steadfastly refused to do anything which would assist the contractors or repair the damage to the public purse. In the meantime the contractors' financial position has steadily worsened. In my view, this matter has gone uncorrected far too long, and if the Ministry of Forests insists on not rectifying this situation, I must ensure that the Legislative Assembly becomes aware of the manner in which the Ministry has failed in its mandate to manage this important public resource.

A BRIEF HISTORY OF THE PROBLEM

Shoal Island is a 20 acre man-made "island" connected by a causeway to Vancouver Island nea Crofton. BCFP established the facility in 1978, using it as a dry land sort to which timber from BCFP's coastal operations could be brought for sorting and scaling. Logs were towed to the island, and each bundle of logs was lifted out of the water and spread out on the ground in rows 250 to 300 feet long. A BCFP employee coded the logs to indicate the sort into which each log would go (i.e. the intended use for each log), and then Ministry of Forests employees were supposed to scale the logs. The logs were subsequently transferred to a number of various sorts, and the next bundle brought up for sorting and scaling.

The scaling task is, in theory, simple enough: a scale stick is used to measure the length and both ends of every log, and from these measurements a log volume is calculated and recorded on a scale return. While the task may be simple in theory, the actual scaling procedure established at Shoal Island was quite complex. The logs were brought forth for scaling in bundles, but the scaling was done not by bundles, but by sort codes. BCFP had devised twenty sort codes, indicating the grade of timber, or the use to which it would be put. For example, some logs would be coded as "Cedar Shingles" and others as "Pine Sawlogs". Four or five Ministry scalers would scale the timber simultaneously, with

each scaler responsible for scaling a number of different sorts. For example, one scaler might be responsible for scaling all logs coded "Cedar Shingles", "Pine Sawlogs" and "Fir Peelers"; he would have three tallies, one for each sort, and he would walk around the spread out logs looking for, scaling, and recording the volume of logs with those codes.

The operation was a very fast one. BCFP's 1978 Annual Report points out that it could process over 2,000 pieces of timber per day at Shoal Island. With five scalers working eight hour days, each scaler would have to scale 50 logs per hour in order to determine the volume of all the timber. The sorted logs were very quickly moved to various outgoing booms, according to their sort code. Some of these booms would remain at Shoal Island for a while; others would be towed to different locations for milling or for export. Practically speaking, it was impossible to reassemble the original bundle of logs once the logs were moved to the outflow booms.

When BCFP transferred its sorting and scaling operations to Shoal Island in mid-1978, Kyuquot Logging was one of BCFP's long-standing logging contractors. Kyuquot Logging continued harvesting timber for BCFP as it had in the past. However, by 1980, it became clear to Kyuquot Logging that the revenues from its BCFP contract had decreased significantly, and at the end of 1980 Kyuquot Logging gave up the contract after trying unsuccessfully to renegotiate a more compensatory rate with BCFP.

At the beginning of 1981 BCFP awarded the contract that had formerly gone to Kyuquot Logging to Traer and Mahood Contractors instead. (I should note that during the period in question four other logging companies also worked under contract for BCFP). Before entering into the contract, Traer and Mahood had calculated their expected return from the contract based on truck load averages from previous operations. Traer and Mahood uses two sizes of logging trucks, and kept fairly detailed records of the truck loads of logs harvested and delivered to BCFP. By multiplying the average volume for each size truck by the number of loads delivered in each size truck, Traer and Mahood could develop an accurate estimate of the volume of timber they had harvested. This had traditionally corresponded closely to the volume shown in the subsequent scale return and thus provided Traer and Mahood with a good estimate of their anticipated revenue.

But when Traer and Mahood received their first scale returns for timber delivered to Shoal Island, they found the scaled volumes considerably lower than the expected volumes based on their own calculations. For the first five booms Traer and Mahood delivered, the scaled volumes were 6%-22% lower than the expected volumes.

Traer and Mahood had received their first scale returns in April, 1981. In May they hired an independent scaler to check the Ministry's scaling of the timber they had harvested. The independent scaler undertook this work without the knowledge of either BCFP or the Ministry scalers.

During May, June and July he examined 37 bundles of logs, and found the Ministry's scale to be 11% lower than his calculation of the volume.

Traer and Mahood then went to BCFP with this information, and a series of checks ensued. In early September 1981 two independent scalers were employed by BCFP and Traer and Mahood to check the Ministry scalers; they found the Ministry scalers had missed 5%-6% of the logs. In late September an independent scaler, a BCFP employee, and five Ministry check scalers checked the scaling done by the Ministry scalers; this time both the Ministry scalers and check scalers appeared to miss about 3%-4% of the logs. In early October the Ministry conducted a further check scale, and obtained an official count of the logs; the results showed that both Ministry scalers and check scalers missed about 2% of the logs. In commenting on these results, the Ministry's Superintendent of Scaling emphasized an important point. In his November 30, 1981 report on the matter, he stated:

> "It is most important to remember at this time that the original scalers knew they were being checkscaled and certainly were doing their best to do an accurate scaling job."

At the end of 1981 the scaling procedures were changed so as to improve both scaling accuracy and checkability. Four new scale and royalty invoices totalling to about $3,400 were issued to BCFP for "check scale adjustments". These invoices were based on the log counts obtained in the three checks conducted in September and October.

The contractors attempted to obtain compensation for their losses from BCFP. In October 1981 BCFP agreed to a rate adjustment to their contracts. The adjustment was for wood delivered only during 1981, and no specific reason appears to be given for the adjustment. However, in exchange for the rate adjustment, the contractors were required to sign an agreement waiving their right to take any future action against BCFP "for compensation for logs delivered by the Contractor to the Company".

This rate adjustment, while not directly linked to the scaling discrepancies, did serve as a form of compensation for the contractors. But the money received did not come close to making up for their total losses during a three and a half year period, and it did not assist Kyuquot Logging at all, since by 1981 Kyuquot Logging was no longer working for BCFP.

The contractors continued in their attempts to obtain a resolution. They met with the Minister of Forests and with the Assistant Deputy Minister for Timber, Range and Recreation. Traer and Mahood prepared briefs on the issue, describing the problem and providing data on the losses they had suffered. They considered legal action against BCFP and/or the Ministry but the anticipated legal costs appeared likely to stretch far beyond their already shrinking finances. Traer and Mahood submitted a damage claim to the Ministry of Forests, and in November 1982 the Deputy Minister rejected the claim, stating that if the contractors had relied on the Ministry's scale returns, they had done so of their own choice;

and that the Ministry viewed the issue as a private matter between the contractors and the company.

The contractors disagreed with this position. The Ministry had after all established the scaling procedure and carried out the scaling, and it was Ministry scalers who had neglected to scale large proportions of the timber harvested by the contractors. As long as the Ministry refused to correct its scaling errors, the contractors would continue to suffer. So they continued to press their case with still more meetings and still more briefs.

In March 1983 the contractors met with the Ministry's Regional Manager in Vancouver and requested that he take action under Section 87 of the Forest Act to estimate the volume of unscaled timber and issue BCFP new scale returns based on that estimate. In the same month, the Minister of Forests had formally requested his Deputy Minister to "conduct a complete and thorough investigation of scaling practices at the Shoal Island dry land sort of B.C. Forest Products Ltd." In an attempt to assist in this investigation the contractors requested an independent forestry consultant, T.M. Thomson and Associates, to prepare an estimate of the volume of timber harvested by each of the six affected contractors but unscaled by Ministry scalers. The Thomson Report was completed in April, 1983 and a copy was provided to the Ministry.

In the meantime the Ministry completed its internal investigation and produced a report for the Minister in May, 1983. However, it was not until August that the contractors received a response to their request for action. At that point the Minister advised:

> "I am unable to find any basis upon which to change the estimates determined by the scale returns already issued.
>
> Furthermore, I have been given legal advice from the Ministry of Attorney General to the effect that Section 87 of the Forest Act has no application to the situation at hand because a scale has taken place and only its accuracy is being questioned. Therefore, I must advise that the official scale will stand and no further accounts will be issued."

The Minister did not comment on any of the points raised by the contractors with respect to the scaling problems at Shoal Island, nor did he comment on the fairly extensive data they had provided in support of their contention. He did not release the report of his Ministry's internal investigation, nor did he release any of the details of that report. He did not provide a copy of the legal opinion which advised him that the Section 87 mechanism was inapplicable. One might have expected more than a three paragraph letter in response to a problem which the contractors had pursued so long and so extensively, a problem which was well documented and which involved significant financial losses for both the contractors and the Province. The contractors were annoyed.

MY INVESTIGATION AND CONCLUSIONS

Traer and Mahood first brought this complaint to my attention in December, 1982. Over time they were joined by the other affected contractors: Kyuoquot Logging, John Reid and Associates Ltd., G.W. Cox and Sons Logging Ltd., Dougan Logging Ltd., and White and Davidson Logging Ltd.

Initially, I collected additional information from the complainants and monitored the progress of the complainants' ongoing discussions and correspondence with the Ministry. On March 1, 1983 I notified the Ministry that I would be investigating the complaint - and on March 4 the Minister requested his staff to conduct the internal investigation described earlier. I awaited the outcome of the Ministry's inquiry, but in the meantime I examined Ministry files, obtained information from Ministry employees, and notified BCFP about the complaint.

Shortly after the Minister advised the complainants that the Ministry had completed its investigation and that he would be taking no further action, I requested a copy of the legal opinion which appeared to form the basis of the Ministry's position. On August 29th my request was refused.

On September 28, 1983 I wrote a detailed letter to the Deputy Minister of Forests, outlining the preliminary conclusions of my investigation and the recommendations I had under consideration. I also sent a copy of this letter to BCFP and invited both BCFP and the Ministry to make any comments or representations they felt appropriate. (These documents are attached as Appendix A). Section 16 of the Ombudsman Act required this measure, since both BCFP and the Ministry are parties which might be adversely affected by my report or recommendations.

Both parties responded in October, 1983. I considered their comments (attached as Appendix B) and in addition decided to seek further legal advice on the applicability of Section 87 of the Forest Act. This work was completed by the end of November, and on December 19, 1983 I provided the Ministry with my final report on the matter (Appendix C). Again, this document dealt with the problem in considerable detail, and in addition I attached a copy of the legal opinion I had obtained confirming that indeed, Section 87 was an appropriate mechanism, (also attached as Appendix C). On January 6, 1984, the Ministry responded, refusing to accept the recommendations in my final report (the Ministry's response is attached as Appendix D). Its reasons for refusing were, as I will indicate later, of little validity and on January 11, 1984 I submitted a report to Cabinet, requesting Cabinet's assistance in correcting the problem (Appendix E).

To date I have received no substantive response, only a verbal confirmation that my report has been received and is under discussion. This issue is a serious one, and one which has caused grief and financial loss for the contractors as well as lost revenues for the Province. I have waited a fair period of time, but I am unwilling to allow the matter to go on indefinitely. With this report I am not only advising you of the situation, but also requesting that you muster whatever power you have available to you to rectify the wrong done to both the contractors and the Province.

The details of my investigation can be found in the Appendices to this report; what follows is a summary of my conclusions.

1. <u>The Ministry's scaling procedures at Shoal Island were deficient in significant respects during the 1978-1981 period.</u>

I have already described how the scaling was done. The integration of the scaling into the sorting process coupled with the pressure to speed up the operation increased the likelihood that logs would be missed in the scaling process, and eliminated the possibility of a second scale. The second scale procedure is important, for it is the means established in the Forest Act by which a person whose interests are affected by a scale can have a scale checked when he believes it may be inaccurate. The Forest Act provides that when inaccuracy is suspected, the timber is to be scaled a second time, and if the difference between the first and second scale is greater than 3%, the second scale is taken as the official scale.

The Shoal Island scaling procedure stacked the deck against the contractors. The scale returns were issued months after the contractors had delivered the timber for harvesting. By the time they were able to compare the scale returns with their own records, the logs were long gone. Some might have remained on the site, but others would have become shakes on a roof, or part of a newspaper. Because the logs were moved immediately to outflow booms according to sort code, there was no means of reassembling the original bundle, no means of doing a second scale, no means of proving that all of the logs in the bundle were not scaled.

The Ministry appears to have concluded that the primary problem was not one of calculating volumes inaccurately, but rather one of missing logs altogether. The report of the Ministry's internal investigation notes:

> "The results of the three check scales made over periods of four or five days in September and October 1981 were sufficiently disturbing to cause the Ministry to change the recording procedures. There is direct evidence that logs were being missed."

Thus the deficiencies in the Ministry's scaling at Shoal Island meant that two important requirements of the Forest Act were not being met

- all of the logs were not scaled, and
- there was no provision for a second scale of the logs.

2. The Ministry is well aware of the scaling deficiencies at Shoal Island, and knows that because of those deficiencies significant volumes of Crown timber were not scaled.

In a December 1981 memo to the Director of the Valuation Branch, a Ministry official tried to explain why the Ministry's scale was consistenly lower than the independent scale:

> "I believe a contributing factor to the inaccuracy of scale at Shoal Island is the complexity of recording required by the present system ... Logs are not being marked as scaled, and omissions, or a duplication of scale is possible.
>
> "The fact that the Forest Service scalers are consistently low may be due to sampling chances, or there may be some other factor influencing the results. Anything which distracts a person can produce a situation where he cannot recall whether or not he has scaled or recorded a log. Nevertheless, I would not expect the Forest Service scalers to consistently scale fewer pieces because of interruptions. There is evidence that the work is being done in a casual manner and we should identify the cause and take corrective action".

Later, in a March, 1982 memo explaining the background of the situation to the Deputy Minister, the Assistant Deputy Minister wrote:

> "Last year a serious scaling discrepancy was discovered at Shoal Island. Due to number of sorts and a high speed specialized processing - scaling method - 10% plus of logs passing through dry land sort were unscaled."

3. The Forest Act provides a means by which this problem can be corrected.

Section 87 of the Forest Act states:

> "Where Crown timber on which royalty or stumpage is payable is processed, sold or removed from the Province without first being scaled under Part 6, the amount of royalty or stumpage payable shall be calculated by multiplying
>
> (a) the regional manager's estimate of the volume of timber; by
>
> (b) the rate of royalty or stumpage, as the case may be, that the regional manager considers would have applied if the timber had been scaled under Part 6".

The Crown timber in question was not scaled as required by Part 6 of the Forest Act. Part 6 and the associated regulations require each log to be scaled and each scaled log to be marked. This was not done. Part 6 also requires the regional manager to conduct a second scale when an objection to the original scale is raised by a person "whose interest is affected by a scale...". The contractors clearly are persons whose interests are affected by the Ministry's scale, but the scaling procedures at Shoal Island did not allow for the possibility of a second scale. Thus the timber was not scaled as required by Part 6, and under these circumstances the regional manager may make an estimate of the unscaled volume.

This the Ministry has refused to do. The Ministry has stated that its refusal is based on a legal opinion provided by the Ministry of Attorney General. It appears that the gist of this opinion is that Section 87 was intended to apply to a situation in which logs were processed or exported without being scaled, and that it was not intended to apply to a

situation in which some logs were missed during the scaling process. This opinion opens up some interesting avenues of thought; carried to its logical consequence it could mean that the Ministry would consider a complete bundle of logs scaled if the bundle went through the scaling process, and even if only one or two of the logs in the bundle were in fact scaled. However, the Ministry has refused to provide me with a complete copy of the opinion, and I am thus unable to determine whether it includes other more meritorious arguments.

I have obtained a legal opinion from Mr. Richard Campbell, Esq., an independent lawyer whose practice is limited to forestry matters (attached to Appendix C). His opinion on this issue can be summarized as follows:

> "Nowhere do the Forest Act or Scaling Regulation deem logs to be scaled by virtue only that other logs that were delivered at the same time to a scaling site were properly scaled. Logs that have been missed have not, in law, been scaled.
>
> Thus, the regional manager is not prevented from invoking Section 87 for the reason suggested ... The regional manager at the very least, has a discretionary authority to make an estimate of unscaled logs under this provision."

Additionally, a lawyer representing one of the contractors has also provided an opinion on the matter (Appendix F). He and Mr. Campbell both agree with the advice obtained from my solicitor that Section 87 is applicable to the Shoal Island situation.

4. <u>There are data available to form the basis of a good estimate of the unscaled volumes.</u>

Section 149 of the Forest Act requires a person harvesting timber to keep accurate records of the volume of timber harvested. The contractors did this, and their records were incorporated into the Thomson estimate. Thomson's study expressed confidence in the accuracy of the data for four out of six of the contractors, and was unable to confirm or reject the data provided by the remaining two contractors. The Ministry's report of its internal investigation questioned the accuracy of truck load averages, but one of the contractors has kept records which show that his truck load averages vary by less than 1%.

I should also point out that Section 149 would also require BCFP to keep accurate records of timber harvested, and that the Ministry has requested - and been refused - access to those records. In a March 17, 1983 letter to BCFP, the Deputy Minister advised BCFP of the Ministry's internal investigation and requested "...cooperation in making available ...such information as may be in your possession that may assist in the resolution of these matters."

BCFP's response was to ask for more information about the scope, nature and statutory authority for the investigation. In this response BCFP's General Counsel pointed out:

> "If, on the other hand, your investigation is not pursuant to a statutory authority, any information provided to you by BCFP might be compellable if future litigation develops arising out of the facts which you are investigating."

The Ministry explained the purpose of the investigation, requested information on production records, log counts, etc., and assured BCFP that the information provided would be dealt with in accordance with Section 149.

There was no written response from BCFP. Instead, at a subsequent meeting with the Ministry, BCFP verbally refused to provide the requested information. I do not believe the Ministry pursued this matter adequately. Section 149(2) authorizes the regional manager to inspect such records, and Section 149(1) requires the company to submit its records to the regional manager if required by the Minister. Neither of these courses was followed. BCFP's records would help determine the proportion of Crown timber brought into Shoal Island by BCFP's employees as opposed to the proportion delivered by contractors; and this information, in turn, would assist in estimating the total unpaid stumpage owed by BCFP.

The Ministry's report of its internal investigation suggests that if the Ministry were to invoice BCFP for the unscaled timber, "...a minimal volume of 85 000m^3 would be invoiced...". There is no explanation of the derivation of this volume. Similarly, in a later memo to the Assistant Deputy Minister, the Director of the Valuation Branch wrote:

> "Our review indicated, on the basis of the best rationalization that we are able to make, a missed volume of 6.3% of the volume scaled for the contractors and time period involved. This works out to 85 000m^3, the figure being approximate since all data has not yet been checked out."

When questioned, Ministry staff said the 6.3% was obtained from the three check scales conducted in September and October 1981; but again, there is no clear explanation of the manner in which the 6.3% was derived, since it does not correspond with the differences found in any of those three checks.

Undoubtedly, there are calculation details which should be discussed and refined. But given the knowledge that the Ministry scalers failed to scale a fair proportion of the Crown timber delivered to Shoal Island, I believe it incumbent upon the Ministry to meet with the contractors and with BCFP, and to jointly review all the available data and any problems associated with the data. The Ministry has not done this.

5. <u>The Ministry's refusal to take corrective action in this situation appears to be based on irrelevant concerns.</u>

The Ministry has at various times stated that it cannot act because Section 87 is not applicable to this situation, or because it does not have the information necessary to prepare an acceptable estimate. As I have indicated, neither of these arguments is supportable. What then could account for the Ministry's refusal? After considerable

deliberation I have come to the unfortunate conclusion that the Ministry's refusal to issue new scale returns is based on the belief that BCFP would resist or reject the additional invoices.

The Ministry's report of its internal investigation considers the implications of issuing additional invoices to BCFP, and notes:

> "Company personnel have already stated that additional payments will not be made unless ordered by a court, and there is doubt that a court would support such action by the Ministry because of the circumstantial nature of the evidence."

(I should point out that this latter statement is probably inaccurate; I have advised the Ministry about a recent judgment in which the Supreme Court of British Columbia relied on discrepancies in log counts and accepted expert testimony to rectify an erroneous scale.)

In a recent letter to me, the Deputy Minister indicated that the Ministry's refusal to act was linked to the possibility that BCFP would appeal any new billings:

> "As you probably know a stumpage account under the Forest Act is subject to a right of appeal. It would be irresponsible of the Ministry to issue an account that it could not justify on appeal, particularly where, as in the case at hand, the licensee has advised it would appeal any further accounts relating to Shoal Island scaling."

It seems there was even some concern as to whether BCFP should have been billed for the discrepancies uncovered in the check scales conducted in

September and October, 1981. A draft of a letter to the Regional Manager in Vancouver, prepared for the Assistant Deputy Minister's signature, included the following comment:

> "You have indicated that you have issued four correcting Scale and Royalty accounts on the basis of the discrepancies uncovered. Authority under the Forest Act to make such adjustments seems to be restricted to cases where a second scale has been performed. Under the circumstances, however, and if the licensee is in agreement, the issuance of corrective S & R invoices seems a practical solution to a problem that at least in part, resulted from shortcomings on the Ministry's side." (emphasis added)

This paragraph was ultimately omitted from the letter sent to the Regional Manager, but I find it noteworthy that Ministry staff felt the need to obtain BCFP agreement before issuing the invoices.

The theme running through these comments causes me grave concern. Six contractors have suffered financial losses they estimate to total $4-$6 million, and as a consequence have been pushed steadily toward financial ruin. The Province has lost millions in uncollected stumpage - money which the Province is entitled to collect. It is known that the Ministry's scaling was erroneous, and that volumes of Crown timber passed through the facility without being assessed for stumpage. The Forest Act gives the Ministry the authority to act under such circumstances: to estimate and to invoice on the basis of that estimate. But the Ministry has refused to exercise this authority - apparently because the sole beneficiary of this deficient scaling process is not willing to be

billed. In my mind, this position is not only contrary to the spirit and intent of the Forest Act, but also contradicts any proposition that the Ministry might be managing the Province's forests in the public interest. When I am assessed for Social Service Tax on a major purchase, the Ministry of Finance does not ask or care whether I am willing to be billed. The tax is due and the Ministry will collect, as they should under the law.

MY RECOMMENDATIONS

I made four recommendations to the Ministry of Forests:

1. that the Ministry of Forests prepare an estimate of the unscaled timber processed through Shoal Island during the period July 1978 to December 1981;
2. that the Ministry provide BCFP and the contractors with its estimate, and with information on the means by which the estimate was developed;
3. that the Ministry consider any representations received from the affected parties before finalizing its estimate; and
4. that the Ministry issue additional scale returns and invoices to BCFP on the basis of this estimate.

This approach is consistent with the Ministry's authority under Section 87 of the Forest Act (and with the practice in effect prior to the proclamation of that Section in January 1979). Additionally, it recognizes that all three parties - the Ministry, contractors, and BCFP - can contribute to the calculation of an acceptable estimate of the unscaled timber. Beyond that, two important purposes would be served: the issuance of additional scale returns would establish the mechanism by which the contractors could obtain payment for all of the timber they harvested for BCFP; and the issuance of additional invoices would set in motion the procedure by which the Ministry could collect the stumpage owing to the Province.

One could argue that it is the Ministry, and not BCFP, who erred, and that BCFP should not be made to suffer because of the Ministry's error. There is some merit to this argument: the scaling procedure was established by the Ministry, and Ministry scalers did (or did not do) the actual scaling. However, BCFP has not, and will not, suffer because of these deficiencies on the Ministry's part. In fact, BCFP benefitted by having the use of Crown timber without being required to pay for the harvesting or stumpage. If at this point in time BCFP becomes required to pay harvesting costs to the contractors and stumpage fees to the Province, the company still benefits, for it has had the use of money which would otherwise have been paid out for these purposes from 1978 to 1981.

The Ministry might reasonably be persuaded to enter into an arrangement under which the payments owing to the Province are spread out over a period of time so as to ease the financial impact on BCFP. There may also be other means by which the Ministry could assist BCFP in meeting its obligations. Since the Ministry was instrumental in the development of the problem, such assistance would appear reasonable, so long as no further damage is caused to the Province's finances.

In addition to the specific recommendations on the Shoal Island situation, I had also requested information on the extent to which this problem had existed in other locations. I have not been provided with this information, although the Deputy Minister stated at one point that

he would send me all the scale returns so that I could extract the required information myself. The scale returns would not, of course, provide the required information, since the intent was to determine what volumes of Crown timber had gone through those facilities without being scaled.

There are five major facilities at which scaling procedures similar to those at Shoal Island were employed. BCFP operates three of these, and the remaining two are operated by MacMillan Bloedel and by Western Forest Products (in which BCFP owns a one-third interest). Since the same scaling procedures were used, it would appear likely that logs were missed in the same fashion. In an internal memo on this possibility, the Ministry has stated:

> "In the period in dispute, no check scales to ascertain the correct number of logs were carried out at (these) operations. Hence there is no data available that could support allegations that logs were missed. (The Superintendent of Scaling) thinks it is unlikely that logging contractors working in these areas have data indicating incorrect scales, nor have, to his knowledge, logging contractors raised this point."

I don't know whether this means that it is unlikely that there were incorrect scales, or that it is unlikely that there is evidence available to prove that there were incorrect scales. I do know that the situation requires closer examination before one can conclude whether or not, or the extent to which stumpage payments are also owing from operations at these locations.

Documents on the Ministry's files indicate that in March, 1983 the Minister of Forests asked one of my complainants to get the Ombudsman out of the investigation. The complainants did not ask me to get out, nor did I get out. But when I made my recommendations to the Ministry, they were rejected. The next step available to me under the Ombudsman Act was to make a report to Cabinet; I did this but as yet I have received no substantive response.

In my view, a grave injustice has resulted from the Ministry of Forests scaling at Shoal Island - an injustice which adversely affects both the contractors and the revenues due the Province. The final avenue open to me in my attempt to have this situation corrected is to place the matter in the hands of the Legislative Assembly. I therefore respectfully submit this report for the consideration of the Legislative Assembly and ask that my recommendations be implemented or that other corrective measures be taken.

TABLE OF APPENDICES *

A. Ombudsman's Preliminary Report, dated September 28, 1983, with covering letters..... 30

B. Responses to Ombudsman's Preliminary Report: Letter from the Deputy Minister of Forests, dated October 18, 1983; letter from BCFP's General Counsel, dated October 13, 1983; letter from the Ombudsman dated November 17, 1983 in response to BCFP's letter..... 48

C. Ombudsman's Final Report, dated December 19, 1983, with covering letters, and with attached legal opinion from Mr. Richard Campbell, Esq., dated November 30, 1983..... 54

D. Response of Ministry of Forests to Ombudsman's Final Report, dated January 6, 1984..... 87

E. Ombudsman's Report to Lieutenant Governor in Council, dated January 11, 1984..... 89

F. Legal Opinion provided to contractors by Mr. D.B. Kirkham, Esq., dated November 24, 1983.....124

* For ease of reference the remaining pages are consecutively numbered on the top, outside corner of each page.

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Province of British Columbia

OMBUDSMAN

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File No: 82 9119

September 28, 1983

Mr. T.M. Apsey
Deputy Minister
Ministry of Forests
1450 Government Street
Victoria, B.C.
V8V 1X4

Dear Mr. Apsey:

Re: Shoal Island Scaling

I have received complaints from a number of different parties pertaining to your Ministry's scaling procedures at Shoal Island. The complainants are Traer & Mahood Contracting Ltd., Kyuquot Logging Ltd., John Reid and Associates, G.W. Cox and Sons Ltd., and Dougan Logging Ltd. All are contractors who were or are logging under contract with B.C. Forest Products Ltd. (B.C.F.P.). The timber which they logged was brought into B.C.F.P.'s dry land sort at Shoal Island, where it was scaled by Ministry of Forests scalers. The scale produced by the Ministry of Forests scalers served as the basis for determining the amount of stumpage or royalty fees owed to the Province by B.C.F.P. for the logging of Crown timber. Also, under the terms of the contract between B.C.F.P. and the complainants, the scale served as the basis upon which B.C.F.P. paid each contractor for his logging operations.

The complaint is that the Ministry of Forests failed in its duty to properly scale Crown timber with the result that the contractors have been significantly underpaid for their logging operations. They estimate that Ministry scalers failed to scale 226,064 cubic metres of the timber which they harvested during a three and a half year period. Using a contract rate ranging from $20. to $28. per cubic metre, this would mean that the contractors involved in the dry land sort at Shoal Island were underpaid a total amount ranging from $4,521,280 to $6,329,792.

Additionally, the complainants have stated that because this volume of timber was not scaled, the Ministry has failed to collect the stumpage which B.C.F.P. is required to pay for Crown timber. If an average stumpage rate of $6 per cubic metre is used, this would indicate that the Ministry has failed to collect approximately $1,356,384. in stumpage on timber which the contractors delivered to Shoal Island, but which was not scaled.

...2

However, the amount of unpaid stumpage could be still higher. The complainants have stated that contractors were responsible for only about 35% of the timber coming into Shoal Island, and that up to 65% of the timber was logged by B.C.F.P. employees. If this were the case, one could expect the volume of unscaled timber to be considerably higher since the same scaling procedures were used. Using the contractors' estimate that 226,064 cubic metres were missed on 35% of the total volume of timber, we could project these figures to estimate that an additional 419,833 cubic metres were missed on the remaining 65%, for a total unscaled volume of 645,897 cubic metres. At an average stumpage rate of $6. per cubic metre, this would mean that the Ministry had failed to collect $3,875,382. in stumpage fees on Crown timber. (Additionally, the average stumpage rate during this period could well be higher than $6.)

The complainants feel that because of the Ministry's failure to perform its duties their companies have been treated unfairly and the public interest has been neglected.

Additionally, during the course of my investigation, I became aware that there are other dry land sorts where a scaling procedure similar to that used at Shoal Island is or was in effect. I understand that there are five other such locations and that the scaling procedures at 4 of these locations were subsequently changed; however, in the case of the Eve River dry land sort the procedure remains the same. In my view there is a need to address the issue of whether there is also uncollected stumpage owing to the Province at these other locations for reasons similar to those in the Shoal Island situation.

Background

Since the issue is a relatively complicated one, I would like to first review my understanding of the events leading up to the current situation.

1. The dry land sort at Shoal Island commenced operation in July, 1978; it appears that the scaling and sorting activities were integrated into the same process using the following steps:

   a) Bundles of logs were brought out of the water, the straps removed, and the logs spread out loosely in rows 250-300 feet in length.

   b) A B.C.F.P. employee would grade the logs, marking them with paint to indicate the sorts into which the logs would eventually be put. There were about 20 different sort codes (fir sawlog, cedar shingle, etc.)

...3

c) Four or five Ministry scalers then walked around the row of logs to do the scaling. Each scaler was responsible for scaling a number of different sorts, and had a different tally for each sort. (For example, if scaler A was to scale timber marked for fir sawlogs, cedar shingles, large cypress and pine sawlogs, he would have four tallies, one for each sort).

d) The scaler was to record the volume of each of his log sorts on the appropriate tally. Tally sheets remained open until complete, so that logs from a number of different bundles could be included on one tally sheet.

2. Kyuquot Logging Ltd. had been logging for B.C.F.P. for a number of years before the Shoal Island dry land sort was put into operation. However, after 1-1/2 years at Shoal Island, Kyuquot found that its contract rates with B.C.F.P. were no longer sufficient to provide an adequate level of financial return. Kyuquot was unable to negotiate another mutually satisfactory rate with B.C.F.P., and lost the contract. The contract was instead awarded to Traer and Mahood at the beginning of 1981.

3. Traer and Mahood received their first scale returns in April, 1981. Using truck load averages from past experience, Traer and Mahood had calculated the volume of wood which they had logged and removed for B.C.F.P. However, the scale volumes provided by the Ministry of Forests were 10%-12% below the volumes calculated by Traer and Mahood.

4. Traer and Mahood hired an independent scaler, Shadforth, to determine the extent and cause of the scaling discrepancy at Shoal Island. Shadforth spent two weeks on this project during May, June and July, 1981, without official permission from B.C.F.P. During that time Shadforth scaled 37 load bundles of logs which had been harvested by Traer and Mahood, and confirmed that the load bundles for small and large trucks were very similar to the truck load averages attained by Traer and Mahood in previous years. At this point the Ministry scalers did not know their work was being checked, and the scale volumes produced by the Ministry scalers were about 11% lower than the volumes calculated by Shadforth. However, the project was discontinued when B.C.F.P. learned of it and objected to it.

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5. Traer and Mahood advised B.C.F.P. of the results of Shadforth's work and of their estimate that 10% to 12% of the timber which they had harvested had not been scaled by the Ministry scalers. B.C.F.P. then agreed to join Traer and Mahood in a further examination of the accuracy of the scaling.

6. Between September 1st and 4th, 1981, two independent scalers (Shadforth representing Traer and Mahood, and Woodrow representing B.C.F.P.) checked the work of the Forest Service scalers. The Ministry scalers were aware of their checking, and certain procedural changes were implemented to facilitate the check. The results were as follows:

	Pieces	Volume
Shadforth	7146	9 586.1 m^3
Woodrow	7169	9 269.7 m^3
Ministry	6763	8 860.0 m^3

This indicated that the Ministry scalers had missed between 5% and 6% of the logs in the three booms that were examined.

7. B.C.F.P. provided this information to the Ministry of Forests and a decision was made to conduct a Ministry checkscale. This checkscale was conducted between September 21-25, 1981, and involved five Ministry checkscalers checking five Ministry scalers. As well, Shadforth conducted a scale on behalf of Traer and Mahood, and a B.C.F.P. employee did a piece count of the logs. The results were as follows:

	Pieces	Volume
Shadforth	9704	12 624.0 m^3
B.C.F.P.	9756	-
Ministry	9416	11 853.7 m^3
Ministry check	9385	11 938.7 m^3

It appeared from these results that the Ministry scalers had missed about 3% of the logs (using Shadforth or the Company for comparison). Again, as in the above case, the Ministry scalers knew they were being checked.

...5

8. From these results, the Ministry concluded that the scaling procedures appeared to be faulty. The Superintendent of Scaling for the Vancouver Region stated:

> "The results of this checkscale indicated to us that very likely we had a scaling procedure problem and not a problem in scaling by individual Forest Service scalers. It is most important to remember at this time that the original scalers knew they were being checkscaled and certainly were doing their best to do an accurate scaling job."

9. Between October 5th and 9th, 1981, the Ministry conducted still another check, this time without the involvement of private scalers. The actual number of logs was determined independently and kept confidential until the scaling was completed. The results of this check are as follows:

	Pieces	Volume
Ministry	9117	12 643.8 m^3
Ministry Check	9122	12 772.8 m^3
Ministry Official Counter	9321	-

As in the above case, the Ministry scalers knew they were being checked. Also as in the above case, the Ministry scalers and checkscalers produced very similar results, but both had missed about 2% of the logs.

10. Through negotiations with B.C.F.P., many of the contractors obtained a rate adjustment to their contracts in October 1981, increasing the rate they were paid for each cubic metre of timber delivered during 1981. There does not appear to be an explicit statement of the reason for the rate adjustment, and the change applied only to timber delivered during 1981. Most of the contractors also signed a waiver agreeing not to bring any further actions against B.C.F.P. for compensation for logs delivered to B.C.F.P. This resulted in cash amounts being paid by B.C.F.P. to many of the contractors.

...6

11. In December 1981, the Ministry issued four scale and royalty adjustment invoices to B.C.F.P. These invoices were derived from the three checks made in September and October, 1981, and made the following adjustments:

	Pieces	Volume	Stumpage or Royalty
(for Sept.1-4)	383	501.8 m^3	$1,604.88
(for Sept.21-25)	288	362.6 m^3	$1,249.81
(for Oct.5-9)	204	282.9 m^3	$ 571.55
Totals	875	1,147.3 m^3	$3,426.24

The adjustments to the piece counts were obtained by comparing the Ministry scale with Shadforth's in the first two cases, and with the Ministry Official Counter in the third case. The volume adjustments were not obtained in the same manner, but instead were derived by multiplying the piece count by Ministry figures for average log volumes.

12. In January 1982 new scaling procedures were implemented at Shoal Island to improve the scaling accuracy and to increase the checkability of the scaling.

13. However, many of the contractors did not feel that the change in the scaling procedures, the supplementary invoices, and B.C.F.P.'s rate adjustment adequately compensated either the contractors or the Province for the logs which had been missed. After a number of discussions, two of the contractors wrote to the Ministry on March 7, 1983 requesting an investigation of the problem at Shoal Island with a view to issuing supplementary stumpage invoices under Section 87 of the Forest Act.

14. The Minister of Forests requested that his staff undertake a thorough investigation of the matter. The contractors retained the services of a forestry consultant, T.M. Thomson, to assist them in developing an estimate of the level of the underscale for each of the six contractors. Thomson's report was then made available to the Ministry. I understand that Ministry staff have reviewed the Thomson report, have discussed the matter with the contractors, and have interviewed scalers. The Ministry also requested information from B.C.F.P., but B.C.F.P. did not provide the information.

...7

15. Ministry staff completed their study in May, 1983. Your May 19, 1983 memorandum to the Minister of Forests spells out the options which appeared available to the Ministry, and makes a recommendation on those options:

> "Two options are now open to the Ministry. The first option is to accept that certain volumes have not been invoiced and to invoice British Columbia Forest Products Ltd. for the volume not scaled. The second option is to take no action on the basis that we do not know what volume, if any, passed through Shoal Island unscaled.
>
> If the Ministry is to take action under the first option a reasonably accurate estimate of the unscaled volume must be made. The testimony of witnesses under oath is not possible to eliminate areas of doubt. A minimal volume of 85 000 m^3 would be invoiced with stumpage charges of about $500,000. The contractors are asking that 226 064 m^3 be invoiced with stumpage charges of about $1,500,000. Company personnel have already stated that additional payments will not be made unless ordered by a court and there is doubt that a court would support such action by the Ministry because of the circumstantial nature of the evidence.
>
> If the Ministry takes no action then the contractors may go to court, or ask the Ombudsman to intercede on their behalf. In either event the investigator would have powers to obtain evidence under oath and order that documents be produced.
>
> Recommendation:
>
> That the contractors be advised that the Ministry cannot determine what volumes, if any, passed through Shoal Island unscaled."

16. On August 2, 1983, the Minister wrote to the two contractors who had requested that Section 87 of the Forest Act be applied. The Minister advised that he was unable to find any basis upon which to change the estimates determined by the scale returns already issued. He also stated that he had been advised by the Ministry of Attorney General that Section 87 did not apply to the Shoal Island situation because a scale had taken place and only its accuracy was being questioned.

...8

17. On August 5, 1983, I requested that you provide me with a copy of the legal opinion given by the Ministry of Attorney General respecting the application of Section 87. You responded on August 29th, stating that the opinion was considered privileged and confidential information between Mr. Waterland and his solicitor, and that it was not possible to provide me with a copy. I must point out that Mr. Waterland, as a client, is quite free to provide me with a copy of his solicitor's opinions; however, he has chosen not to do so. It is therefore not correct to state that it was not possible to provide me with a copy.

Relevant Legislation

Part 6 of the Forest Act pertains to the scaling of timber, and Part 7 pertains to the payment of royalty or stumpage. Certain sections of both of these parts are relevant to this case.

With respect to scaling, I have noted the following:

- Section 73(1)(b) requires that Crown timber be scaled by a Forest Service scaler;

- Section 77(1) provides that;

> "...Where a person who has had a scale performed under Section 73 or whose interest is affected by a scale performed under Section 73
>
> (a) in a notice served on the regional manager objects to the scale return completed for the scale... the regional manager shall have the timber scaled again and a second scale return prepared".

With respect to the payment of stumpage, Section 87 is relevant:

> "Where Crown timber on which royalty or stumpage is payable is processed, sold or removed from the Province without first being scaled under Part 6, the amount of royalty or stumpage payable shall be calculated by multiplying
>
> (a) the regional manager's estimate of the volume of timber; by
>
> (b) the rate of royalty or stumpage...that the regional manager considers would have applied if the timber had been scaled under Part 6.

Findings

As a result of my investigation thus far I have found that there is fairly general agreement that the Ministry's scaling procedures at Shoal Island were deficient in significant aspects. Among the more important deficiencies are the following:

- The incoming bundles were not scaled as a unit; instead, the scaling was done simultaneously by several scalers according to outgoing sort. This decreased control over the scaling to such an extent that it was likely that logs would be missed.

- The tallies were kept according to outgoing sort as well, with the result that tallies were kept open for varying lengths of time, depending on the volume in the different log sorts. Tallies kept open for longer periods of time tended to become less legible because of weather conditions and handling.

- The scalers did not mark the timber to indicate that it had been scaled, as required by the regulations; it was therefore impossible to know whether any particular log had been scaled.

- The operation was a very fast one, and the scaling was subsumed within the sorting procedure. As a result there was considerable pressure on the scalers to complete their work quickly so that the timber could be placed in the outgoing booms. This increased the possibility that logs would be missed because of the rush, or even because a scaler was late for work or missed a shift.

- The timber was then placed in different outgoing booms; this made it virtually impossible to reassemble the original bundle for the purposes of either a check scale or a second scale.

There are two important implications of the deficient scaling procedure; first, some timber passed through Shoal Island without being scaled, and second, there did not appear to be any possibility of a second scale. I will discuss each of these points separately.

Timber Not Scaled: Statements made by Ministry staff, and documents obtained from Ministry files indicate that there is general acceptance within the Ministry of the fact that some timber passed through Shoal Island without being scaled. For example, the memo written to Assistant

...10

Deputy Minister MacPherson by the Superintendent of Scaling in November, 1981 provides the results of the various checkscales which were made, and concludes:

> "The scaling procedure at Shoal Island could not continue, as a weakness in the system had been proven."

In December, 1981, the Scaling Policy Forester made the following comments to the Director of the Valuation Branch in response to a question as to why the Forest Service scale was consistently lower than the private scale:

> "I believe a contributing factor to the inaccuracy of scale at Shoal Island is the complexity of recording required by the present system ... Logs are not being marked as scaled and omission, or a duplication of scale is possible.
>
> The fact that the Forest Service scalers are consistently low may be due to sampling chance or there may be some other factor influencing the results. Anything which distracts a person can produce a situation where he cannot recall whether or not he has scaled or recorded a log. Nevertheless, I would not expect the Forest Service scalers to consistently scale fewer pieces because of interruptions. There is evidence that the work is being done in a casual manner and we should identify the cause and take corrective action."

Also, when the problem was raised with the Minister of Forests in early 1982, you asked Assistant Deputy Minister MacPherson for an explanation, and he made the following comments:

> "Last year a serious scaling discrepancy was discovered at Shoal Island. Due to number of sorts and a high speed specialized processing - scaling method - 10% plus of logs passing through dry land sort were unscaled."

The fact that the scaling procedure was changed fairly rapidly once the extent of the problem became obvious also corroborates the view that there is general acceptance of the position that the scaling was deficient in significant aspects.

However, there does not appear to be general agreement on the volume of timber which was not scaled. As I noted in the initial section outlining the complaint, the contractors believe that of the timber they delivered to Shoal Island, 226,064 cubic metres (13.7%) were not scaled. The T.M.

Thomson report expressed confidence in the accuracy of the data from four of the six contractors, and was unable to confirm or reject the data provided for the remaining two contractors. T.M. Thomson calculated truck load averages for each contractor from 1975 to 1982, where available; this included the period before Shoal Island commenced operations, the period during which the original scaling procedures were in effect, and the period after the scaling procedure had been amended. The load averages before Shoal Island commenced operations and after the implementation of the amended scaling procedures, appear to be fairly consistent; however those for the intervening period are lower.

On the other hand, the internal review undertaken by the Ministry appeared to acknowledge a somewhat lower volume. In a memo to Assistant Deputy Minister MacPherson, the Director of the Valuation Branch stated:

> "Our review indicated, on the basis of the best rationalization that we were able to make, a missed volume of 6.3% of the volume scaled for the contractors and time period involved.
>
> This works out to 85 000 m^3, the figure being approximate since all data has not yet been checked out."

It was not clear how the 6.3% was derived, nor what base was used to obtain an equivalent volume of 85 000 m^3. (The Thomson report shows volumes obtained from the Scale and Royalty accounts, the total of which is 1 426 815 m^3 for the period and contractors in question; 6.3% of this figure is 89 889 m^3). The internal report does make reference to variations in load averages and to the 6% allowed for sinkage in the Thomson report. The variations in load averages appear to be industry averages for coastal operations, and do not appear to recognize the extremely consistent data provided by at least some of the contractors. The 6% sinkage factor was intended to recognize the improved wood recovery which B.C.F.P. anticipated when scaling, sorting and storage was switched to the new dry land sort operation from the previous water operation. The 6% figure may be low or it may be high; but it seems logical that some such factor would have to be added to the pre-Shoal Island data to obtain a proper estimate.

I do not know what volume of timber passed through Shoal Island without being scaled; but I do know that Section 87 of the Forest Act makes reference to the "regional manager's estimate of the volume of the timber" (emphasis mine), and therefore clearly anticipates that actual volumes will not be available. The contractors have provided a lot of data from which an estimate can be derived; there may be certain points,

...12

such as the sinkage factor, which require further discussion, but where it is clear that timber has been missed in the scaling process, I believe the Ministry has a responsibility to try to estimate the extent of the unscaled timber.

Second Scale: As noted earlier, Section 77(1) requires the regional manager to have a second scale performed when requested to do so by the person who had the original scale performed, or by a person whose interests are affected by the original scale. The contractors, who are paid on the basis of the Forest Service scale, would clearly fit the description of parties whose interests would be affected by the scale.

However, it appears that the scaling procedure at Shoal Island was such that there was never an opportunity for a second scale to be performed. This lack of opportunity stems from two factors: first, scale returns were delivered a number of months after the scaling had taken place, by which time the logs could well be processed into lumber and/or moved to another location; and second, when the scaling operation was completed, the logs were moved into outflow booms according to sort code, making it virtually impossible to reassemble the original bundle.

Comments on Ministry file documents indicate that Ministry staff recognized this weakness. For example, in a March 15, 1982 memo to the Director of the Valuation Branch, Assistant Deputy Minister MacPherson made the following comments:

> "Section 77 of the Forest Act allows for a second scale. But it appears Shoal Island method of operation makes a second scale impossible - Do we require a change in system to guarantee the ability to have a second scale? Or do we require a change in the Forest Act?"

Also, in an April 2, 1982 memo, the Scaling Policy Forester explained the procedure that would have been necessary to provide a second scale at Shoal Island:

> "A second scale can be made of the timber included in any one invoice providing the logs have not been manufactured but for the contractor the costs would be heavy as his timber will have been sorted and mixed with other timber in a number of booms. All booms would have to be dewatered, bundles broken and logs spread. The contractors' timber could not be identified if a log were not marked, or if two contractors used the same log mark."

...13

In actual practice, this would require that all of the logs on that invoice be available. Given the fact that the timber would have been sorted into a number of outgoing booms, that some of those booms could have been towed to other locations, that some of the logs could have been manufactured, and that several months would elapse between scaling and receipt of invoices, there appears to be very little likelihood that all of the logs on an invoice would be available for a second scale.

I have also noted comments on Ministry files which indicate that the four invoices which were issued to B.C.F.P. in December 1981 were issued pursuant to section 77 of the Forest Act. Section 77 describes procedures to be followed in the case of a request for a second scale, and therefore was not actually applicable to the situation. The three checks that were made were in fact types of check scales since they were done at the same time as the original scale, and certainly long before any invoice for the original scale had been issued. I would assume that if it had been possible to do a second scale, the Ministry would have followed that procedure, rather than doing a check scale and then invoicing on the basis of second scale procedures.

On the basis of the above points, it is my initial conclusion that a second scale was not possible under the procedures in effect at Shoal Island between mid 1978 and the end of 1981.

Preliminary Conclusions:

In my view there is strong evidence that

i) some of the timber passing through Shoal Island was not scaled; and

ii) there was no opportunity for a second scale to be conducted at Shoal Island.

Since Part 6 of the Forest Act requires that all Crown timber be scaled by a Forest Service scaler, and requires a regional manager to have a second scale performed when requested to do so by a party affected by the scale, it is my preliminary conclusion that the timber processed through Shoal Island was not scaled according to the requirements of Part 6 of the Forest Act.

The Forest Act includes a provision for situations such as this; Section 87 requires the regional manager to estimate the volume of Crown timber which was not scaled under Part 6, and to multiply that estimate by the applicable rate to determine the amount of stumpage or royalty to be paid. It is my preliminary conclusion that Section 87 should have been applied in the Shoal Island situation since the timber in question is Crown timber on which royalty or stumpage is payable, and which has been processed without first being scaled under Part 6 of the Forest Act.

...14

However, to date your Ministry has declined to take the requested action under Section 87. I recognize that there may be some difficulties involved in accurately calculating the required estimate, but since there is overwhelming evidence that timber was missed, I believe that the Ministry has a responsibility to both the contractors and the public to undertake that task. There are documents on Ministry files which indicate that B.C.F.P. advised Ministry staff that if the Ministry did issue further invoices, B.C.F.P. would refuse to pay the amounts unless ordered to do so by a court. This may have been the reason for the Ministry's refusal to undertake a calculation of the unscaled timber, and if it was, I would consider this to constitute an irrelevant consideration.

The Ministry has a statutory responsibility to properly scale timber harvested from Crown land and to collect the royalties due the Province from that Crown timber. Undoubtedly, the Legislature intended that the Ministry exercise these responsibilities so that the public's interest in this valuable resource would be protected.

In this case, it appears clear that over a period of time and in one or more locations a significant volume of Crown timber was harvested without being scaled and without the corresponding royalties being collected. As a consequence of this, B.C.F.P. (and possibly other companies at other dry land sorts) have had the benefit of significant volumes of Crown timber without having to pay the Crown its fees for the use of that timber. While this no doubt assisted B.C.F.P., I believe it incumbent upon the Ministry to take the necessary steps to ensure that the proper royalties are collected by the Province.

In addition to the detrimental effect on the public interest, the Ministry's failure to scale all timber processed through Shoal Island has also caused specific hardship for the contractors who logged the timber. The complainants had contracted with B.C.F.P. on the understanding that the scaling of the timber they harvested would be accurate and complete, and the prices to be paid were based on this understanding. As it is, timber was harvested for which the contractors have not been paid.

...15

In conclusion, it appears to me most unjust that the contractors and the public (through lost royalties) be expected to bear the loss which has directly resulted from the improper scaling procedures previously employed by the Ministry at Shoal Island.

Proposed Recommendations

The intent of this letter is to advise you that on the above grounds, I may make the following recommendations:

- that the Ministry of Forests prepare an estimate of the unscaled timber processed through Shoal Island during the period July 1978 to December 1981;

- that the Ministry provide B.C.F.P. and the contractors with its estimate, and the reasons for it;

- that the Ministry consider any representations received from the affected parties before finalizing its estimate; and

- that the Ministry issue additional scale returns and invoices to B.C.F.P. on the basis of this estimate.

Section 16 of the Ombudsman Act provides that where it appears likely that the Ombudsman will make a recommendation which might adversely affect other parties, the Ombudsman must provide such parties with an opportunity to make such representations before finally deciding the matter. Both the Ministry of Forests and B.C.F.P. are parties which might be adversely affected by the recommendations I am considering, and the intent of this letter is to advise both parties of my proposed recommendations and of the grounds for those recommendations.

If you wish to make representations or to comment on any of the points which I have raised, please do so within three weeks of the date of this letter. Also, please include in your response information or comments on the following specific items:

a) the total volume of Crown timber processed through Shoal Island between July 1978 and December 1981;
b) the total volume of Crown timber processed through each of the other dry land sorts using the 'Shoal Island' procedure for the period in which that procedure was in place;
c) your estimate of the volume of Crown timber which may have been processed without being scaled at each of these other dry land sorts, with supporting documentation.

...16

If you have questions, or would like to discuss this matter, please contact me and I will attempt to meet your needs.

Yours sincerely,

Karl A. Friedmann
Ombudsman

c.c. The Honourable T.M. Waterland
Minister of Forests

c.c. Mr. Michael E. Hoole
Vice President and General Counsel
British Columbia Forest Products Ltd.

Legislative Assembly
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File No: 82 9119

September 28, 1983

Mr. Michael E. Hoole
Vice President and General Counsel
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V6E 2X3

Dear Mr. Hoole:

Some time ago one of my investigators contacted you to advise you that I had received a complaint about the Ministry of Forests' scaling procedures at Shoal Island. I have now substantially completed my investigation of this matter and I have advised the Ministry of Forests of my preliminary conclusions and of the recommendations I am considering.

Section 16 of the Ombudsman Act requires that when it appears likely that the Ombudsman will make a recommendation which could adversely affect a person or authority, the Ombudsman must advise those possibly adversely affected and must provide them the opportunity to make representations before finally deciding the matter. My investigation indicates that B.C. Forest Products may be adversely affected by the recommendations I am considering; for that reason I am attaching a copy of my letter to the Ministry of Forests. Please review its contents and advise me of any inaccuracies or omissions. Also, if you care to comment on the points raised, or to make representations on behalf of B.C. Forest Products, please do so within 3 weeks of the date of this letter.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

c.c. T.M. Apsey
Deputy Minister
Ministry of Forests

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone (604) 387-5855
Zenith 2221

File No: 82 9119

September 28, 1983

The Honourable T.M. Waterland
Minister of Forests
Parliament Buildings
Victoria, B.C.
V8V 1X4

Dear Mr. Waterland:

Re: Shoal Island Scaling

Some time ago your staff were advised that I had received a complaint about the above matter. At your request, your staff had conducted an internal review of the issue and concluded that review in May of this year. In August you advised two of the complainants that after considering the results of that review you could find no basis upon which to change the scale returns and that the official scale would stand.

I have now completed my investigation of the complaint, and have written to Mr. Apsey to advise him of my conclusions and of the recommendations which I am considering. Because of the importance of the matter, and because you have had direct involvement in it, I am attaching a copy of my letter to Mr. Apsey for your information.

Yours sincerely,

Karl A. Friedmann
Ombudsman

c.c. T.M. Apsey
Deputy Minister of Forests

Province of
British Columbia

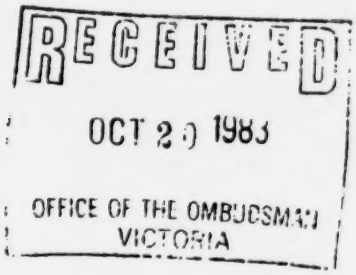
OFFICE OF THE
DEPUTY MINISTER

Ministry of
Forests

Parliament Buildings
Victoria
British Columbia
V8W 3E7

October 18, 1983

Our File: 83/06/48/F)(DLC)
Your File: 82 9119



Dr. Karl Friedmann
Ombudsman
8 Bastion Square
Victoria, B. C.
V8W 1H9

Dear Dr. Friedmann:

Re: Shoal Island Scaling

This is in response to your letter of September 28, 1983.

I have now had an opportunity to review your letter which sets out in some considerable detail the background to Ministry scaling procedures at Shoal Island and your preliminary conclusions. While I am not prepared to waive the privilege claimed in my letter to you of August 5, 1983, in view of your recommendations it would seem appropriate that I indicate to you in some further detail the advice of the Attorney General in respect of Section 87 of the Forest Act. That opinion provided in part "... that not only is the Ministry not obliged to send a further account pursuant to S. 87, it cannot do so. Section 87 was designed to cover the situation where a volume of logs has been processed or exported without being scaled. It seems apparent that the Legislature did not intend to cover logs that might be missed when the scaling procedure was carried out... On my reading of the statute timber is scaled under Part 6 when it has gone through the scaling process and a scale return is delivered as provided in S. 75. The stumpage account is then determined pursuant to S. 81 on the volume of timber reported in the scale.

In my opinion the rendering of the account is final and, unless a second scale is required pursuant to the provisions of S. 77 that is an end to the matter. The Act simply does not contemplate sending a further account for individual logs which were missed in the scaling process."

The opinion goes on to deal with a number of matters which are really not relevant to the interpretation of Section 87 and which will therefore remain confidential.

In any event the effect then of your recommendation is that I disregard this legal opinion and follow a course of action that I am advised is not lawful. This I am unable to do. I therefore propose to take no further action on your recommendations and before proceeding further I would ask that you carefully consider the implications of the position you take.

Yours very truly,

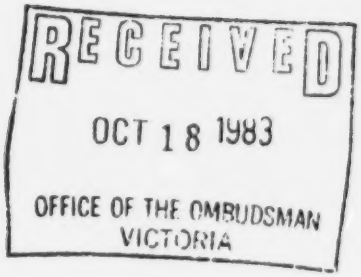
T. M. Apsey
Deputy Minister

British Columbia Forest Products Limited

1050 West Pender Street
Vancouver, British Columbia, Canada V6E 2X3
Telephone (604) 665-3821 / Telex 04-51166 / Cable BEFORPROD

BCFP

October 13, 1983



Office of the Ombudsman
Legislative Assembly
Province of British Columbia
8 Bastion Square
Victoria, B.C.
V8W 1H9

Attention: Mr. K.A. Friedmann
Ombudsman

Dear Sir:

Re: Shoal Island Scalling Procedures

Thank you for your letter of September 28, 1983, and the copy of your letter addressed to Mr. T.M. Apsey, Deputy Minister of Forests.

We do not think it necessary or appropriate to comment upon the allegations of fact contained in your letter to Mr. Apsey. However, we do believe it appropriate to make two comments:

1. The complaint leading to your inquiry was made by a number of contractors, who, at various times, did work for BCFP. The relationship, and state of accounts, between BCFP and these contractors is a private contractual matter between private parties. It may be that, in investigating the conduct of government officials, you have discovered some facts which bear upon that private relationship, however, in our view, your office has no proper function to perform with reference to the relationship or rights of BCFP and our contractors.

2. We are confident that your office will maintain the confidentiality of information obtained by it during the course of any inquiry you carry out. In particular, we rely upon you to refrain from permitting the contractors access to that information particularly as it may relate to the relationship between the contractors and BCFP.

In conclusion, we note that you have made reference to Section 87 of the Forest Act. It is our view, and that of our legal counsel, that the Minister and Ministry of Forests have no power under Section 87 to issue a new or supplemental assessment in the circumstances of this case. Should the Minister or Ministry purport so to do, we will instruct our counsel to take action in the courts to prevent the issuance or enforcement of such an assessment.

Yours truly,

BRITISH COLUMBIA FOREST
PRODUCTS LIMITED

Michael E. Hoole
Vice-President and
General Counsel

MEH:mm
c.c. Mr. T.M. Apsey
Deputy Minister
Ministry of Forests
1450 Government Street
Victoria, B.C.
V8V 1X4

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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Telephone: (604) 387-5855
Zenith 2221

November 17, 1983

Mr. Michael E. Hoole
Vice-President and General Counsel
B.C. Forest Products Limited
1050 West Pender Street
Vancouver, B.C.
V6E 2X3

Dear Mr. Hoole:

Re: Shoal Island Scaling Procedures

I have received, with thanks, your letter of October 13, 1983.

I do appreciate the concerns outlined in your letter, and wish to take this opportunity to comment upon them. With respect to item #1, I can assure you that I have investigated and intend only to investigate matters related to the conduct of government officials, primarily those employed by the Ministry of Forests. You may wish to refer to section 10 of the Ombudsman Act, and subsequent sections, for further clarification of my statutory mandate.

I understand your concerns respecting confidentiality set out in your item #2, and can assure you that no information will be released by my office except as permitted by the Ombudsman Act. I should point out that section 9 of the Ombudsman Act permits the release of information for certain purposes; the relevant sections state that:

> 9.(3) The Ombudsman and every person on his staff shall, subject to this Act, maintain confidentiality in respect of all matters that come to their knowledge in the performance of their duties under this Act.
>
> (5) An investigation under this Act shall be conducted in private unless the Ombudsman considers that there are special circumstances in which public knowledge is essential in order to further the investigation.
>
> (6) Notwithstanding this section, the Ombudsman may disclose or authorize a member of his staff to disclose a matter that, in his opinion, is necessary to
>
> (a) further an investigation;

...2

(b) prosecute an offence under this Act; or

(c) establish grounds for his conclusions and recommendations made in a report under this Act. (my emphasis)

With respect to your final paragraph, I appreciate that you must take such action as is necessary to further the best interests of your company. My concern, of course, is that government officials act in the best interests of the public, and you will find the specific matters which I must address at the end of an investigation enumerated in section 22 of the Ombudsman Act.

Thank you again for writing.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

cc: Mr. T.M. Apsey
Deputy Minister
Ministry of Forests

Legislative Assembly
Province of British Columbia

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December 19, 1983

Mr. T.M. Waterland
Minister of Forests
Parliament Buildings
Victoria, B. C.
V8V 1X4

Dear Mr. Waterland:

Re: Shoal Island Scaling

You may recall that in September I sent you an information copy of a letter I had written to Mr. Apsey advising him of my preliminary conclusions with respect to the complaint about scaling procedures on Shoal Island. Since then I have received comments from Mr. Apsey and from British Columbia Forest Products Ltd., and I have obtained a legal opinion from Mr. Richard Campbell, Esq. I have considered the information obtained from these various sources, and I have now finalized my conclusions and recommendations.

I am attaching, for your information, a copy of my letter to Mr. Apsey. This letter includes the report of my investigation with my final conclusions and recommendations. Since this matter obviously has implications for the Minister of Finance, perhaps he should receive a copy of my report as well. Please advise if you would like me to forward a copy to Mr. Curtis, or whether you would prefer to send him a copy yourself.

Yours sincerely,

Karl A. Friedmann
Ombudsman

c.c.: Mr. T.M. Apsey
Deputy Minister of Forests

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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Telephone: (604) 387-5855
Zenith 2221

File No: 82 09119

December 19, 1983

Mr. T.M. Apsey
Deputy Minister
Ministry of Forests
1450 Government Street
Victoria, B. C.
V8W 3E7

Dear Mr. Apsey:

Re: Shoal Island Scaling

On September 28, 1983 I wrote to you in some detail to advise you of my preliminary conclusions with respect to the Shoal Island complaint, and to advise you of the recommendations I was considering. That letter also provided you with an opportunity to make representations on any of the issues I had raised. Your October 18, 1983 response addressed only the applicability of Section 87 of the Forest Act to the Shoal Island situation. You indicated that the Ministry of Attorney General had advised you that Section 87 was intended to cover a situation in which logs were processed or exported without being scaled, and not to cover a situation in which logs were missed during the scaling process. The Ministry of Attorney General's conclusion was that the Ministry could not send a further account to BCFP pursuant to Section 87 and on that basis you decided to take no further action on the matter.

I considered your comments and decided to seek further legal advice from a source outside my office. I contacted Mr. Richard Campbell, Esq., who confines his practice to forestry law, and requested that he provide me with a legal opinion on a number of issues related to the applicability of Section 87. I have now received his opinion and attach it for your information. You will note that Mr. Campbell has concluded in part that:

> "The regional manager may, if he wishes, invoke Section 87 of the Forest Act to estimate the volumes of unscaled logs. He is not prevented from doing so by reason only that the logs went through the "scaling process" or that stumpage and royalty accounts were issued in respect of scaled logs that were delivered at the same time."

...2

In short, Section 87 does constitute a remedy, and does not prevent you from taking action to correct the problem created at Shoal Island.

I have now finalized my conclusions, and you will find the complete report of my investigation attached. In summary my findings are as follows:

- The Ministry of Forests established the scaling procedures at BCFP's dry land sort at Shoal Island, and Ministry scalers were responsible for the scaling of Crown timber at the site.

- The scaling procedures were deficient in a number of ways, and as a result, during a 3 1/2 year period, a volume of Crown timber was processed through the dry land sort without being scaled.

- The Ministry scale formed the basis on which stumpage was charged, and on which contractors were paid for their logging. However, the Province was not paid stumpage on the unscaled volume of Crown timber, and the contractors were not paid for logging it - although BCFP did benefit from the use of the timber.

- Because of the Ministry of Forests' deficient scaling, both the Province and the contractors have suffered. The contractors have estimated that 226,064 cubic metres of timber they harvested and delivered to Shoal Island was unscaled, and that as a result, they have been underpaid from $4,521,280 to $6,329,792. The unpaid stumpage on this volume (at $6 - $9 per cubic metre) ranges from $1,356,384 to $2,034,576; and this amount doubles if BCFP employees (independent of the contractors) harvested and delivered an equivalent volume of Crown timber to Shoal Island.

- Section 87 of the Forest Act applies to situations in which timber was processed or exported without being scaled. In such situations the Ministry is to estimate the volume of unscaled timber, apply the appropriate stumpage rates, and invoice the licensee on the basis of that estimate. Section 87 is an appropriate remedy for timber processed through Shoal Island after January 1, 1979. For timber processed prior to that date a similar procedure could be used since that was, in fact, the Ministry's practice prior to the coming into force of the current Forest Act.

- The Ministry's decision to not apply Section 87 is unjust, and detrimentally affects both the Province and the contractors. The Ministry should take immediate action to correct this situation.

...3

Additionally, in my last letter I pointed out that similar scaling procedures had been in place at five other dry land sorts, and apparently are still in effect at one of those locations. I had requested that you provide me with specific information on the volumes of Crown timber which might have been processed through those dry land sorts without first being scaled. You did not respond to this request, nor to my request for data on the total volume of Crown timber processed through Shoal Island between July, 1978 and December, 1981. Please provide this information in your response to this letter.

My recommendations with respect to the Shoal Island complaint are listed at the end of the attached report. These recommendations are made pursuant to Section 22 of the Ombudsman Act. I would also request, as provided for in Section 23 of the Ombudsman Act that you notify me by January 6, 1984 of the steps you intend to take to give effect to my recommendations. I consider this to be a reasonable period of time for your response since you have had my preliminary findings before you since September 28, 1983, and my final report does not differ substantially from my preliminary findings. If I have not had an adequate response by January 6, 1984, I will have to consider making a report to the Lieutenant Governor in Council, pursuant to Section 24 of the Ombudsman Act.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Attachment

c.c.: T.M. Waterland, Minister

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
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OMBUDSMAN INVESTIGATION OF SHOAL ISLAND SCALING

THE COMPLAINT

I have received a complaint about the Ministry of Forests' scaling procedures at Shoal Island. Briefly, the complaint is that the Ministry of Forests failed in its duty to properly scale Crown timber, and that this failure has had two important and negative consequences:

- the contractors who logged the timber were significantly underpaid for their efforts;

- the Ministry did not collect a significant amount of money in stumpage fees owed to the Province for the use of Crown timber.

The complaint was brought to me by contractors who worked under contract for B.C. Forest Products Ltd. (BCFP) during the 1978-1981 period, logging Crown timber which was brought into BCFP's dry land sort at Shoal Island: Traer and Mahood Contracting Ltd., Kyuquot Logging Ltd., John Reid (for Quatam Logging and J.R.B. Contractors), G.W. Cox and Sons Logging Ltd., and Dougan Logging Ltd.

The Crown timber which they logged for BCFP was taken to the dry land sort at Shoal Island, where it was scaled by Ministry of Forests scalers. The scale produced by the Ministry of Forests scalers served as the basis for determining the amount of stumpage or royalty fees owed to the Province by BCFP for the logging of Crown timber. Also, under the terms of the contract between BCFP and the contractors, the scale served as the basis upon which BCFP paid each contractor for his logging operations.

By comparing the scale results of truck loads of timber delivered to the Shoal Island dry land sort with the scale results of earlier deliveries, the contractors came to the conclusion that a proportion of the timber which they had logged and delivered to the dry land sort had not been scaled. The contractors enlisted the assistance of a professional forester, T.M. Thomson to help them prepare an estimate of the extent of the underscale.

...2

Thomson estimated that Ministry of Forests scalers had failed to scale 226 064 cubic metres of the Crown timber which the six contractors had harvested and delivered during a three and a half year period. Using a contract rate ranging from $20.00 to $28.00 per cubic metre, this would mean that the contractors were underpaid a total amount ranging from $4,521,280.00 to $6,329,792.00.

If Ministry scalers failed to scale this volume of Crown timber, the Ministry also failed to collect the stumpage which should have been charged BCFP for the use of Crown timber. Using a stumpage rate ranging from $6.00 to $9.00 per cubic metre, this would mean that the Ministry had failed to collect between $1,356,384.00 and $2,034,576.00 in stumpage on timber which the contractors delivered to Shoal Island, but which was not scaled.

Moreover, the amount of uncollected stumpage could be significantly higher. The complainants have stated that they logged about half of the Crown timber brought into Shoal Island, with the remainder being logged by BCFP. Since the same scaling procedures were applied, one could expect that a similar volume of timber harvested by BCFP employees was also left unscaled, and thus the above estimate of uncollected stumpage at Shoal Island would double.

Additionally, during the course of my investigation, I became aware that there are other dry land sorts where a scaling procedure similar to that used at Shoal Island is or was in effect. I understand that there are five other such locations and that the scaling procedures at four of these locations were subsequently changed; however, in the case of the Eve River dry land sort the procedure remains the same. Although I have requested comments from the Ministry on the volume of timber which might have been processed through these dry land sorts without first being scaled, I have received no response, and at present I am unable to estimate the additional uncollected stumpage which this might represent.

...3

BACKGROUND

The relevant events leading up to this complaint are as follows:

1. In July, 1978, BCFP commenced operation of a dry land sort at Shoal Island. The logs brought into the dry land sort were Crown timber harvested from various locations within BCFP's licence areas. The logs were towed to the island by water, and were to be scaled by Ministry of Forests scalers. The scaling and the sorting of the logs were integrated into the same process through the following steps:

   a) Bundles of logs were brought out of the water, the straps removed, and the logs spread out loosely in rows 250-300 feet in length.

   b) A BCFP employee would grade the logs, marking them with paint to indicate the sorts into which the logs would eventually be put. There were about 20 different sort codes (fir sawlog, cedar shingle, etc.)

   c) Four or five Ministry scalers then walked around the row of logs to do the scaling. Each scaler was responsible for scaling a number of different sorts, and had a different tally for each sort. (For example, if scaler A was to scale timber marked for fir sawlogs, cedar shingles, large cypress and pine sawlogs, he would have four tallies, one for each sort).

   d) The scaler was to record the volume of all of the logs in each of his log sorts on the appropriate tally. Tally sheets remained open until complete, so that logs from a number of different bundles could be included on one tally sheet.

2. Kyuquot Logging Ltd. had been logging for BCFP for a number of years before the Shoal Island dry land sort was put into operation. However, after 2-1/2 years at Shoal Island, Kyuquot found that its contract rates with BCFP were no longer sufficient to provide an adequate level of financial return. Kyuquot was unable to negotiate another mutually satisfactory rate with BCFP, and lost the contract. The contract was instead awarded to Traer and Mahood at the beginning of 1981.

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3. Traer and Mahood received their first scale returns in April, 1981. Using truck load averages from past experience, Traer and Mahood had calculated the volume of wood which they had logged and removed for BCFP. However, the scale volumes provided by the Ministry of Forests were 10%-12% below the volumes calculated by Traer and Mahood.

4. Traer and Mahood hired an independent scaler, Shadforth, to determine the extent and cause of the scaling discrepancy at Shoal Island. Shadforth spent two weeks on this project during May, June and July, 1981, without official permission from BCFP. During that time Shadforth scaled 37 load bundles of logs which had been harvested by Traer and Mahood, and confirmed that the load bundles for small and large trucks were very similar to the truck load averages attained by Traer and Mahood in previous years. At this point the Ministry scalers did not know their work was being checked, and the scale volumes produced by the Ministry scalers were about 11% lower than the volumes calculated by Shadforth. However, the project was discontinued when BCFP learned of it and objected to it.

5. Traer and Mahood advised BCFP of the results of Shadforth's work and of their estimate that 10% to 12% of the timber which they had harvested had not been scaled by the Ministry scalers. BCFP then agreed to join Traer and Mahood in a further examination of the accuracy of the scaling.

6. Between September 1st and 4th, 1981, two independent scalers (Shadforth representing Traer and Mahood, and Woodrow representing BCFP) checked the work of the Ministry of Forests scalers. The Ministry scalers were now aware that their work was being checked, and certain procedural changes were implemented to facilitate the check. The results were as follows:

	Pieces	Volume
Shadforth	7146	9 586.1 m^3
Woodrow	7169	9 269.7 m^3
Ministry	6763	8 860.0 m^3

This indicated that the Ministry scalers had still missed between 5% and 6% of the logs in the three booms that were examined.

...5

7. BCFP provided this information to the Ministry of Forests and a decision was made to conduct a Ministry check scale. This check scale was conducted between September 21-25, 1981, and involved five Ministry check scalers checking five Ministry scalers. As well, Shadforth conducted a scale on behalf of Traer and Mahood, and a BCFP employee did a piece count of the logs. The results were as follows:

	Pieces	Volume
Shadforth	9704	12 624.0 m^3
BCFP	9756	-
Ministry	9416	11 853.7 m^3
Ministry check	9385	11 938.7 m^3

It appeared from these results that the Ministry scalers had missed about 3% to 4% of the logs (using Shadforth or BCFP for comparison). Again, as in the above case, the Ministry scalers knew they were being checked.

8. From these results, the Ministry concluded that the scaling procedures appeared to be faulty. The Superintendent of Scaling for the Vancouver Region stated:

> "The results of this checkscale indicated to us that very likely we had a scaling procedure problem and not a problem in scaling by individual Forest Service scalers. It is most important to remember at this time that the original scalers knew they were being checkscaled and certainly were doing their best to do an accurate scaling job."

9. Between October 5th and 9th, 1981, the Ministry conducted still another check, this time without the involvement of private scalers. The actual number of logs was determined independently and kept confidential until the scaling was completed. The results of this check are as follows:

	Pieces	Volume
Ministry	9117	12 643.8 m^3
Ministry Check	9122	12 772.8 m^3
Ministry Official Counter	9321	-

...6

As in the above case, the Ministry scalers knew they were being checked. Also as in the above case, the Ministry scalers and check scalers produced very similar results, but both had missed about 2% of the logs, as calculated by the official count.

10. Through negotiations with BCFP, many of the contractors obtained a rate adjustment to their contracts in October 1981, increasing the rate they were paid for each cubic metre of timber delivered during 1981. There does not appear to be an explicit statement of the reason for the rate adjustment, and the change applied only to timber delivered during 1981. Most of the contractors also signed a waiver agreeing not to bring any further actions against BCFP for compensation for logs delivered to BCFP. This rate adjustment resulted in cash amounts being paid by BCFP to many of the contractors.

11. In December 1981, the Ministry issued to BCFP four scale and royalty invoices for "check scale adjustments". These invoices were derived from the three checks made in September and October, 1981, and included the following increases:

	Pieces	Volume	Stumpage or Royalty
(for Sept.1-4)	383	501.8 m^3	$1,604.88
(for Sept.21-25)	288	362.6 m^3	$1,249.81
(for Oct.5-9)	204	282.9 m^3	$ 571.55
Totals	875	1 147.3 m^3	$3,426.24

The adjustments to the piece counts were obtained by comparing the Ministry count with Shadforth's in the first two cases, and with the Ministry's official count in the third case. The volume adjustments were not obtained in the same manner, but instead were derived by multiplying the piece count by Ministry figures for average log volumes. It should be noted that no Ministry check scaler was involved in the September 1-4 check, and that the Ministry used Shadforth's count as the basis for the adjustments for both the September 1-4 and the September 21-25 checks.

12. In January 1982 new scaling procedures were implemented at Shoal Island to improve the scaling accuracy and to increase the checkability of the scaling.

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13. However, many of the contractors did not feel that the change in the scaling procedures, the supplementary invoices, and BCFP's rate adjustment adequately compensated either the contractors or the Province for the logs which had been missed. After a number of discussions, two of the contractors wrote to the Ministry on March 7, 1983 requesting an investigation of the problem at Shoal Island with a view to issuing supplementary stumpage invoices under Section 87 of the Forest Act.

14. The Minister of Forests requested that his staff undertake a thorough investigation of the matter. The contractors retained the services of a forestry consultant, T.M. Thomson, to assist them in developing an estimate of the level of the underscale for each of the six contractors who had brought logs into the dry land sort during the 1978-1981 period. Thomson's report was then made available to the Ministry. Ministry staff reviewed the Thomson report, discussed the matter with the contractors, and interviewed scalers. The Ministry also requested information from BCFP, but BCFP did not provide the information.

15. Ministry of Forests staff completed their study in May, 1983. The Deputy Minister's May 19, 1983 memorandum to the Minister of Forests spelled out the options which appeared available to the Ministry, and made a recommendation on those options:

> "Two options are now open to the Ministry. The first option is to accept that certain volumes have not been invoiced and to invoice British Columbia Forest Products Ltd. for the volume not scaled. The second option is to take no action on the basis that we do not know what volume, if any, passed through Shoal Island unscaled.
>
> If the Ministry is to take action under the first option a reasonably accurate estimate of the unscaled volume must be made. The testimony of witnesses under oath is not possible to eliminate areas of doubt. A minimal volume of 85 000 m^3 would be invoiced with stumpage charges of about $500,000. The contractors are asking that 226 064 m^3 be invoiced with stumpage charges of about $1,500,000. Company personnel have already stated that additional payments will not be made unless ordered by a court and there is doubt that a court would support such action by the Ministry because of the circumstantial nature of the evidence.

...8

If the Ministry takes no action then the contractors may go to court, or ask the Ombudsman to intercede on their behalf. In either event the investigator would have powers to obtain evidence under oath and order that documents be produced.

Recommendation:

That the contractors be advised that the Ministry cannot determine what volumes, if any, passed through Shoal Island unscaled."

16. On August 2, 1983, the Minister of Forests wrote to the two contractors who had requested that Section 87 of the Forest Act be applied. The Minister advised that he was unable to find any basis upon which to change the estimates determined by the scale returns already issued. He also stated that he had been advised by the Ministry of the Attorney General that Section 87 did not apply to the Shoal Island situation because a scale had taken place and only its accuracy was being questioned.

17. On August 5, 1983, I wrote to the Deputy Minister of Forests, requesting that he provide me with a copy of the Ministry of the Attorney General's legal opinion respecting the application of Section 87. Mr. Apsey responded on August 29th, stating that the opinion was considered privileged and confidential information between Mr. Waterland and his solicitor, and that it was not possible to provide me with a copy. I subsequently pointed out that Mr. Waterland, as a client, is quite free to provide me with a copy of his solicitor's opinion; however, he chose not to do so, and under these circumstances, it is incorrect to state that it was not possible to provide me with a copy.

18. On September 28, 1983 I wrote to the Deputy Minister advising him in considerable detail of my findings on the Shoal Island complaint, of my preliminary conclusions, and of the recommendations I had under consideration. That letter was written pursuant to Section 16 of the Ombudsman Act, which requires that when it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation which might adversely affect an authority or person, the Ombudsman must inform the person or authority of the grounds, and must give them an opportunity to make representations before finally deciding the matter. I also provided BCFP and the Minister of Forests with a copy of my letter.

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19. On October 13, 1983, BCFP responded to my letter. The response did not comment on the specifics of my letter, but instead was primarily concerned with the privacy of BCFP's relationship with its contractors, and with the confidentiality of information pertaining to that relationship. In addition, BCFP expressed the view that Section 87 of the Forest Act did not empower the Ministry of Forests to issue new or supplemental invoices, and that if this action were attempted, BCFP would take legal action to prevent it.

20. On October 18, 1983, the Deputy Minister of Forests responded to my letter. Again, the response did not comment on the specifics of my letter. Instead, the Deputy Minister cited part of the Ministry of the Attorney General's legal opinion to which I had earlier been refused access. The gist of the partial opinion was that the Ministry of Forests could not send BCFP a further invoice pursuant to Section 87 of the Forest Act. I should note that my solicitor has advised me that one may not selectively claim privilege by providing part of a legal opinion and refusing access to the remainder. My solicitor has advised the Deputy Minister of this, and has requested the remainder of the Ministry of the Attorney General's opinion.

21. After considering the comments of both BCFP and the Deputy Minister of Forests, I sought additional legal advice on the applicability of Section 87 to the Shoal Island situation. I contacted Mr. Richard Campbell, Esq., who confines his practice to forestry law, and he has advised me that Section 87 is applicable to the determination of an estimate of the volume of timber scaled at Shoal Island after January 1, 1979, when the "new" Forest Act became effective. I have attached a copy of Mr. Campbell's opinion.

RELEVANT LEGISLATION AND REGULATIONS

Part 6 of the Forest Act pertains to the scaling of timber, and Part 7 pertains to the payment of royalty or stumpage. Certain sections of both of these parts are relevant to this case.

From Part 6, which deals with scaling, I have noted the following:

- Section 73(1)(b) requires that Crown timber be scaled by a Forest Service scaler;
- Section 74(1)(a) requires that timber be scaled according to prescribed procedures;
- Section 77(1) provides that:

  "...Where a person who has had a scale performed under Section 73 or whose interest is affected by a scale performed under Section 73

  (a) in a notice served on the regional manager objects to the scale return completed for the scale... the regional manager shall have the timber scaled again and a second scale return prepared".

Part 7 deals with the payment of stumpage, and Section 87 is relevant:

> "Where Crown timber on which royalty or stumpage is payable is processed, sold or removed from the Province without first being scaled under Part 6, the amount of royalty or stumpage payable shall be calculated by multiplying;
>
> (a) the regional manager's estimate of the volume of timber; by
>
> (b) the rate of royalty or stumpage...that the regional manager considers would have applied if the timber had been scaled under Part 6.

The Scaling Regulation (B.C. Reg. 563/78) includes many details of the scaling requirements. It requires that timber be scaled as soon as possible after it is cut, and it specifies the steps to be followed in scaling each log. For example, it states that a scaler shall use a scale stick to measure the diameter of each end, and shall record the radius of each end. Similarly, the length of each log is to be measured and recorded.

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FINDINGS

Scaling Deficiencies:

Through my investigation, I have determined that the Ministry's scaling procedures at Shoal Island were deficient in significant aspects. Among the more important deficiencies were the following:

- The incoming bundles were not scaled as a unit; instead, the scaling was done simultaneously by several scalers according to outgoing sort. This decreased control over the scaling to such an extent that it was likely that logs would be missed.

- The tallies were kept according to outgoing sort as well, with the result that tallies were kept open for varying lengths of time, depending on the volume in the different log sorts. Tallies kept open for longer periods of time tended to become less legible because of weather conditions and handling.

- The scalers did not mark each log to indicate that it had been scaled, as required by the regulations; it was therefore impossible to know whether any particular log had been scaled.

- The operation was a very fast one, and the scaling was subsumed within the sorting procedure. As a result there was considerable pressure on the scalers to complete their work quickly so that the timber could be placed in the outgoing booms. This increased the possibility that logs would be missed because of the rush, or even because a scaler was late for work or missed a shift.

- The timber was then placed in different outgoing booms; this made it virtually impossible to reassemble the original bundle for the purposes of either a check scale or a second scale.

Statements made by Ministry staff, and documents obtained from Ministry files indicate that there is general acceptance and recognition within the Ministry of the fact that a volume of timber passed through Shoal Island without being scaled. For example, the memo written to Assistant Deputy Minister MacPherson by the Superintendent of Scaling in November, 1981 provides the results of the various check scales which had been made, and concludes:

> "The scaling procedure at Shoal Island could not continue, as a weakness in the system had been proven."

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In December, 1981, the Scaling Policy Forester made the following comments to the Director of the Valuation Branch in response to a question as to why the Forest Service scale was consistently lower than the private scale:

> "I believe a contributing factor to the inaccuracy of scale at Shoal Island is the complexity of recording required by the present system ... Logs are not being marked as scaled and omission, or a duplication of scale is possible.
>
> The fact that the Forest Service scalers are consistently low may be due to sampling chance or there may be some other factor influencing the results. Anything which distracts a person can produce a situation where he cannot recall whether or not he has scaled or recorded a log. Nevertheless, I would not expect the Forest Service scalers to consistently scale fewer pieces because of interruptions. There is evidence that the work is being done in a casual manner and we should identify the cause and take corrective action."

Also, when the problem was raised with the Minister of Forests in early 1982, the Deputy Minister asked Assistant Deputy Minister MacPherson for an explanation, and Mr. MacPnerson made the following comments:

> "Last year a serious scaling discrepancy was discovered at Shoal Island. Due to number of sorts and a high speed specialized processing - scaling method - 10% plus of logs passing through dry land sort were unscaled."

The fact that the scaling procedure was changed fairly rapidly once the extent of the problem became obvious also corroborates the view that there is general acceptance of the position that the scaling was deficient in significant aspects.

Compliance With Part 6 of the Forest Act:

An important implication of this deficiency is that the scaling procedure was such that it did not meet the requirements of Part 6 of the Forest Act in two respects: the scaling was not done according to prescribed procedures, and it did not allow an opportunity for a second scale.

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Mr. Campbell has pointed out that Section 74(1) requires that timber be scaled according to prescribed procedures. Those procedures are embodied in the Scaling Regulation, which clearly specifies that a number of measurements are to be made and recorded for each log (unless a sampling procedure had been approved, which was not the case at Shoal Island). It is apparent that a significant number of logs were not measured and their volume was not recorded, and thus the scaling was not done according to the procedures prescribed by the regulations.

Also, the scaling at Shoal Island did not meet the requirements of the Forest Act with respect to a second scale. As noted earlier, Section 77(1) requires the regional manager to have a second scale performed when requested to do so by the person who had the original scale performed, or by a person whose interests are affected by the original scale. The contractors, who are paid on the basis of the Forest Service scale, would clearly fit the description of parties whose interests would be affected by the scale.

However, it appears that there was never an opportunity for a second scale to be performed at Shoal Island. This lack of opportunity stems from two factors: first, scale returns were delivered a number of months after the scaling had taken place, by which time the logs could well be processed into lumber and/or moved to another location; and second, when the scaling operation was completed, the logs were moved into outflow booms according to sort code, making it virtually impossible to reassemble the original bundle.

Comments on Ministry file documents indicate that Ministry staff recognized this weakness. For example, in a March 15, 1982 memo to the Director of the Valuation Branch, Assistant Deputy Minister MacPherson made the following comments:

> "Section 77 of the Forest Act allows for a second scale. But it appears Shoal Island method of operation makes a second scale impossible - Do we require a change in system to guarantee the ability to have a second scale? Or do we require a change in the Forest Act?"

Also, in an April 2, 1982 memo, the Scaling Policy Forester explained the procedure that would have been necessary to provide a second scale at Shoal Island:

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> "A second scale can be made of the timber included in any one invoice providing the logs have not been manufactured but for the contractor the costs would be heavy as his timber will have been sorted and mixed with other timber in a number of booms. All booms would have to be dewatered, bundles broken and logs spread. The contractors' timber could not be identified if a log were not marked, or if two contractors used the same log mark."

In actual practice, this would require that all of the logs on that invoice be available. Given the fact that the timber would have been sorted into a number of outgoing booms, that some of those booms could have been towed to other locations, that some of the logs could have been manufactured, and that several months would elapse between scaling and receipt of invoices, there appears to be very little likelihood that all of the logs on an invoice would be available for a second scale.

I have also noted that the Ministry's internal report of May, 1983 indicates that the four invoices which were issued to BCFP in December 1981 were issued pursuant to Section 77 of the Forest Act. Section 77 describes procedures to be followed in the case of a request for a second scale, and therefore was not actually applicable to the situation. The three checks that were made were in fact types of check scales since they were done at the same time as the original scale, and certainly long before any invoice for the original scale had been issued. I would assume that if it had been possible to do a second scale, the Ministry would have followed that procedure, rather than doing a check scale and then invoicing on the basis of second scale procedures.

Applicability of Section 87 of the Forest Act:

The partial legal opinion provided by the Deputy Minister of Forests takes the position that timber is scaled when it has gone through the scaling process and a scale return has been provided. It further states that Section 87 was intended to cover the situation in which a volume of logs had been processed or exported without being scaled, and that it was not intended to cover a situation in which some logs had been missed during the scaling procedure.

This position differs from the opinion provided by Mr. Campbell. Mr. Campbell has advised me that if some logs were not scaled, then the requirements of Section 74(1) were not met, and such logs were not scaled within the meaning of the Forest Act. He has pointed out that neither the Forest Act nor the Scaling Regulations deem logs to have been scaled by virtue of the fact that other logs which were delivered to the scaling site at the same time were properly scaled. His conclusion is that

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Section 87 is applicable for the purpose of estimating the volume of timber delivered to, but unscaled at the dry land sort for the period commencing January 1, 1979.

It was on that date that Section 87 of the Forest Act became effective. There was no equivalent section in the previous version of the Forest Act. However, although the previous Act was silent on this point, I understand that Section 87 was simply the embodiment of the Ministry's actual practice prior to the coming into force of the "new" Act. That is, prior to 1979, when a situation occurred in which Crown timber was processed without being scaled, it was the Ministry's practice to estimate the volume of unscaled timber, apply the appropriate stumpage rate, and bill the licensee on the basis of the scale estimate.

Section 87 provides a legal remedy for estimating the volume of unscaled timber processed through Shoal Island after January 1, 1979. However, since prior to that it was the Ministry's practice to prepare estimates of unscaled timber, I believe the procedures described in Section 87 should also be applied to the Crown timber which was processed through Shoal Island prior to 1979.

Estimating the Unscaled Timber:

The internal report prepared by Ministry staff in May 1983 makes reference to possible difficulties in determining the volumes of timber which passed through Shoal Island unscaled. I recognize that the Ministry does not have data which would permit the calculation of the precise volume of timber which went unscaled, and I also recognize that Ministry staff and the contractors have produced different estimates of the unscaled timber.

The contractors believe that of the timber they delivered to Shoal Island, 226 064 cubic metres (13.7%) were not scaled. The T.M. Thomson report expressed confidence in the accuracy of the data from four of the six contractors, and was unable to confirm or reject the data provided for the remaining two contractors. T.M. Thomson calculated truck load averages for each contractor from 1975 to 1982, where available; this included the period before Shoal Island commenced operations, the period during which the original scaling procedures were in effect, and the period after the scaling procedure had been amended. The load averages before Shoal Island commenced operations and after the implementation of the amended scaling procedures, appear to be fairly consistent; however those for the intervening period are lower.

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On the other hand, the internal review undertaken by the Ministry appeared to acknowledge a somewhat lower volume. In a memo to Assistant Deputy Minister MacPherson, the Director of the Valuation Branch stated:

> "Our review indicated, on the basis of the best rationalization that we were able to make, a missed volume of 6.3% of the volume scaled for the contractors and time period involved.
>
> This works out to 85 000 m^3, the figure being approximate since all data has not yet been checked out."

I could find nothing on Ministry documents to support the 6.3%, or to explain how it was derived or what base was used to obtain an equivalent volume of 85 000 m^3. (The Thomson report shows volumes obtained from the Scale and Royalty accounts, the total of which is 1 426 815 m^3 for the period and contractors in question; 6.3% of this figure is 89 889 m^3). My investigator was advised by Ministry staff that the 6.3% was derived from the piece counts done in September, 1981. However, I would not consider this to be a good basis for an estimate since at that point the scalers knew they were being checked, and as the Superintendent of Scaling has pointed out, they "...certainly were doing their best to do an accurate scaling job".

The internal report does make reference to variations in load averages and to the 6% allowed for sinkage in the Thomson report. The variations in load averages cited in the report appear to be industry averages for coastal operations, and do not appear to recognize the extremely consistent data provided by at least some of the contractors. The 6% sinkage factor was intended to recognize the improved wood recovery which BCFP anticipated when scaling, sorting and storage was switched to the new dry land sort operation from the previous water operation. The 6% figure may be low or it may be high; but it seems logical that some such factor would have to be added to the pre-Shoal Island data to obtain a proper estimate.

I do not know what volume of timber passed through Shoal Island without being scaled; but I do know that Section 87 of the Forest Act makes reference to the "regional manager's estimate of the volume of the timber" (emphasis mine), and therefore clearly anticipates that actual volumes will not be available. The contractors have provided a lot of data from which an estimate can be derived; there may be certain points, such as the sinkage factor, which require further discussion, but given that a volume of timber has been missed, I believe that the Ministry has a responsibility to make the best estimate possible of the unscaled volume on the basis of the available data.

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I had also noted the comments on Ministry files to the effect that BCFP had advised Ministry staff that additional payments would not be made unless ordered by a court and that there was doubt that a court would support such action by the Ministry because of the circumstantial nature of the evidence. Mr. Campbell has advised me that there is precedent for the acceptance of circumstantial evidence in situations such as Shoal Island. He has provided me with a copy of a judgment in which the Court relied on discrepancies in piece counts and accepted expert testimony to rectify an erroneous scale. If the Ministry's refusal to implement Section 87 was at all the result of a belief that it would be unable to enforce its supplementary billings, perhaps this will serve to allay the Ministry's fear on that point.

CONCLUSIONS

As a result of my investigation I have come to the following conclusions:

1. A volume of Crown timber was processed through Shoal Island during the 1978-1981 period without being scaled, and there is wide recognition of this fact within the Ministry.

2. This unscaled volume represents Crown timber delivered to BCFP for its use; but the Province was not paid stumpage for BCFP's use of the Crown timber, and the contractors were not paid for logging it.

3. The scaling procedures at Shoal Island did not conform to the requirements of the regulations, and did not allow an opportunity for a second scale to be performed; therefore the timber was not scaled as required by Part 6 of the Forest Act.

4. Section 87 of the Forest Act provides an appropriate remedy for situations in which timber has been processed without first being scaled under Part 6 of the Act. Section 87 would apply to timber processed through Shoal Island since 1979 and continuing until the procedures were changed.

5. Prior to the coming into force of Section 87, it was the Ministry's practice to prepare an estimate of any unscaled, processed timber and to bill on the basis of that estimate. This practice can be applied to the timber processed through Shoal Island prior to 1979.

6. There is data available which would permit the Ministry to develop a good estimate of the unscaled timber. The contractors have provided a significant amount of data on the volumes they delivered to Shoal Island; additionally, further information can be obtained from BCFP and from the Ministry's own files to prepare estimates of volumes logged by BCFP.

7. The Ministry's decision not to implement Section 87 in the Shoal Island situation has detrimentally affected the contractors and the revenue accruing to the Province; it is my conclusion that the decision is unjust.

The Ministry has a statutory responsibility to properly scale timber harvested from Crown land and to collect the royalties due the Province from that Crown timber. Undoubtedly, the Legislature intended that the Ministry exercise these responsibilities so that the public's interest in this valuable resource would be protected.

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In this case, it is clear that over a period of time and in one or more locations a significant volume of Crown timber was harvested without being scaled and without the corresponding royalties being collected. As a consequence of this, BCFP (and possibly other companies at other dry land sorts) have had the benefit of significant volumes of Crown timber without having to pay the Crown its fees for the use of that timber. While this no doubt assisted BCFP, I believe it incumbent upon the Ministry to take the necessary steps to ensure that the proper royalties are collected by the Province.

In addition to the detrimental effect on the public interest, the Ministry's failure to scale all timber processed through Shoal Island has also caused specific hardship for the contractors who logged the timber. The complainants had contracted with BCFP on the understanding that the scaling of the timber they harvested would be accurate and complete, and the prices to be paid were based on this understanding. As it is, timber was harvested for which the contractors have not been paid.

In conclusion, it appears to me most unjust that the contractors and the public (through lost stumpage fees) be expected to bear the loss which has directly resulted from the improper scaling procedures previously employed by the Ministry at Shoal Island.

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RECOMMENDATIONS

The scaling procedure at Shoal Island was established by the Ministry of Forests and implemented by its employees. It was deficient, and as a result, both the contractors and the public purse have suffered. Section 87, and the practice in place before the effective date of Section 87 provide a remedy by which the negative results of the Ministry's actions can be corrected. I consider it imperative that the Ministry take advantage of this remedy; specifically, I make the following recommendations:

1. that the Ministry of Forests prepare an estimate of the unscaled timber processed through Shoal Island during the period July 1978 to December 1981;

2. that the Ministry provide BCFP and the contractors with its estimate, and with information on the means by which the estimate was developed;

3. that the Ministry consider any representations received from the affected parties before finalizing its estimate; and

4. that the Ministry issue additional scale returns and invoices to BCFP on the basis of this estimate.

Karl A. Friedmann
Ombudsman

December 19, 1983

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November 30, 1983

Mr. Brent Parfitt
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Dear Mr. Parfitt:

Shoal Island Complaint

I have received your letter of October 24, 1983 and have reviewed its enclosures. As well, I have considered the additional questions you raised in your letter of November 16, 1983. After having considered the relevant law, I can now provide you with my opinion.

Facts

The complicated facts underlying this problem are set out thoroughly in Dr. Friedmann's letter of September 28, 1983 to Deputy Forests Minister T.M. Apsey, so I will not repeat them in detail. In brief, British Columbia Forest Products Limited ("BCFP") has operated a dryland log sort at Shoal Island since July of 1978. Logs are towed there by water from a number of logging operations on the Coast that are carried out by BCFP and by its contractors. After the logs are de-watered onto the Island and before they are watered again in sorted bundles, they are scaled by Ministry of Forests log scalers. These scales are used to calculate stumpage and royalty accounts that are payable by BCFP to the Province for cutting Crown timber. As well, the scales are used under private contract as the basis for BCFP's payments to its logging contractors, who are paid according to the volumes of logs they produce.

By mid-1981, one of BCFP's contractors became concerned about apparent discrepancies between the volumes of logs reported in Ministry scales and the volumes indicated by the contractor's production records. There followed a series of independent and Ministry checks of the Ministry scales at Shoal Island over the summer and fall of that year, which indicated that from 2 to 11 percent of the logs delivered there were not scaled at all. This fact is central to the legal issues that have been raised. My opinion is based on the assumption that the discrepancies in the scales arose because some individual logs were not scaled at all, and not because logs were scaled incorrectly.

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Except for an adjustment following check scales made in the fall of 1981, the Ministry has taken no action to re-estimate the log production delivered to Shoal Island in prior periods. The Forest Act, R.S.B.C. 1979, c. 140, as amended, provides for logs to be scaled a second time when the accuracy of an initial scale is questioned, but this procedure was of no assistance because, when the errors were discovered, the logs had long since been mixed with other logs, removed from Shoal Island and likely converted into finished products. Early in 1982, Ministry scaling procedures on Shoal Island were modified in an effort to tighten their accuracy. However, two of the contractors still contend that they were underpaid for log deliveries from mid-1978.

Legal Issues

The two contractors have requested the Ministry to invoke a provision of the Forest Act, in order that the volumes of logs delivered to Shoal Island can be re-calculated. Section 87 provides as follows:

> 87. Where Crown timber on which royalty or stumpage is payable is processed, sold or removed from the Province without first being scaled under Part 6, the amount of royalty or stumpage payable shall be calculated by multiplying
> (a) the regional manager's estimate of the volume of the timber; by
> (b) the rate of royalty or stumpage, as the case may be, that the regional manager considers would have applied if the timber had been scaled under Part 6.

The Ministry of Forests has received legal advice, quoted in part in a letter dated October 18, 1983, to Dr. Friedmann from Mr. Apsey, as follows:

> "... that not only is the Ministry not obliged to send a further account pursuant to S. 87, it cannot do so. Section 87 was designed to cover the situation where a volume of logs has been processed or exported without being scaled. It seems apparent that the Legislature did not intend to cover logs that might be missed when the scaling procedure was carried out ... On my reading of the statute timber is scaled under Part 6 when it has gone through the scaling process and a scale return is delivered as provided in S. 75. The stumpage account is then determined pursuant to S. 81 on the volume of timber reported in the scale.
>
> In my opinion the rendering of the account is final and, unless a second scale is required pursuant to the provisions of S. 77 that is an end to the matter. The Act simply does not contemplate sending a further account for

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individual logs which were missed in the scaling process."

The legal issues that I will consider are as follows:

1. Were the missed logs "scaled" under relevant forest legislation?

2. May the regional manager make an estimate of unscaled logs under section 87 and under previous legislation?

3. Is the regional manager required to make an estimate of unscaled logs under section 87 and under previous legislation?

4. If an estimate is made under section 87, may the Ministry of Forests re-invoice BCFP for additional royalty or stumpage based on the estimate?

5. May circumstantial evidence be used to estimate the volume of un-scaled logs?

Scaling Under Former Forest Act and Regulations

The current Forest Act and Scaling Regulation became effective on January 1, 1979. The Shoal Island dryland sort began taking log deliveries in July of 1978, so for its first few months of operations the now repealed Ministry of Forests Act (RSBC 1960 c. 153, as amended) and the former Scaling Regulations applied.

I have concluded that any logs that were missed by scalers on Shoal Island were not "scaled", within the meaning of the former provisions. However, neither the former Act nor Regulations contained a parallel to section 87 of the current Act, which enables the Ministry to estimate volumes of unscaled timber. Accordingly, there is no statutory remedy available to the Ministry with respect to any logs missed in scales carried out prior to January 1, 1979.

Despite this lack of exactly parallel statutory authority, the Ministry had remedies in contract and other statutory remedies to make estimates of unscaled timber for stumpage and royalty purposes. I have examined the various forms of Crown forest tenure that were in use under the former Act as well as certain royalty provisions in the former Act. The holders of Tree Farm Licences, Special Timber Licences, Timber Leases, Pulp Licences and Pulp Leases were clearly required by statute or contract to pay royalty on timber cut from the tenures. The language in Timber Sale Licences and Timber Sale Harvesting Licences is not as definitive, but the stumpage provisions in the documents, in their contexts, imply such an obligation.

Thus, under the former tenure arrangements, the Crown had a

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right under contract or statute to stumpage and royalty on timber cut. The Crown's right to these payments were not necessarily tied to a log scale, and the Ministry had legal claims in contract or under statute for unscaled timber. For claims that arose under contract (all tenures except for Special Timber Licences and Pulp Licences), the Ministry, as a party to the contract, had the discretion to enforce its right but cannot be compelled to do so. The relevant provision in the former Act that applied to Special Timber Licences and Pulp Licences took the form of a reservation of royalty in favour of the Crown on timber cut. In my opinion this section gave the Ministry a discretion to enforce payment, but it could not be construed to require the Ministry to claim payment for unscaled logs.

The remainder of this opinion is confined to logs delivered to Shoal Island on and after January 1, 1979, the date when the current Forest Act and Scaling Regulation came into force.

Scaling Under Current Forest Legislation and Regulations

Section 87 is available only where logs have not been "scaled", so a central question is whether or not the missed logs were "scaled" under the law. Part 6 of the Forest Act deals with log scaling. Section 73 prohibits the manufacture, sale or removal from the Province of any logs cut from private or Crown land unless they are scaled. Section 74 requires scales to be carried out "according to the prescribed procedures"; that is, according to the regulations.

The Scaling Regulation, (BC 563/78 as amended by 600/79, 16/80, 501/80, 256/81 and 10/83) sets out detailed scaling procedures. Section 7(1) provides for two methods of scaling:

> 7(1) Timber that is required to be scaled under the Act shall be scaled either by
> (a) determining the volume and classifying the quality of each piece of timber, or
> (b) determining the volume and classifying the quality of a sample of timber.
>
> (emphasis added)

Section 7 goes on to provide for the Ministry's approval of sample plans where the second alternative is to be used. I understand that individual "stick" scaling referred to in section 7(1)(a) was intended to be used on Shoal Island and I should be safe in assuming that no sampling procedure of the kind referred to in section 7(1)(b) was approved. That being the case, the Regulation required each log to be scaled individually. This rule has been in force since the Regulation became effective on January 1, 1979.

If some logs in fact were not scaled at Shoal Island since January 1, 1979, the provisions of the Regulation were not

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met. As a result, section 74(1) of the Forest Act was not followed and, in my opinion, such logs were not scaled within the meaning of the Act.

The opinion quoted in Mr. Apsey's October 18, 1983 letter to Dr. Friedmann concludes that the Ministry is prevented from invoking section 87 because the unscaled logs had "gone through the scaling process". I do not agree with this conclusion. Nowhere do the Forest Act or Scaling Regulation deem logs to be scaled by virtue only that other logs that were delivered at the same time to a scaling site were properly scaled. Logs that have been missed have not, in law, been scaled.

Thus, the regional manager is not prevented from invoking section 87 for the reason suggested in that opinion. The regional manager at the very least has a discretionary authority to make an estimate of unscaled logs under this provision.

I have considered whether section 87 is mandatory, requiring the regional manager to make an estimate of unscaled logs. This area of the law of statutory interpretation is extremely uncertain. Even where an enactment, such as section 87, contains a "shall", courts have sometimes declined to hold that the provision is mandatory. Courts generally base their conclusions on an examination of each provision in the context of the statute as a whole, with unpredictable results. Because of this uncertainty, I am unable to provide a firm and unqualified opinion on this issue.

Invoicing Stumpage and Royalty

The legal opinion quoted above from Mr. Apsey's letter contends that a stumpage or royalty account issued by the Ministry to a licensee is final unless a second scale is performed under section 77 of the Forest Act. This view implies that an estimate of unscaled logs may not be made under section 87 and that stumpage or royalty may not be billed, once an account has been rendered to the licensee in respect of logs that have been scaled.

I am unable to agree with this contention. First, as I concluded above, logs that are missed during the scaling process have not been scaled within the meaning of the Forest Act and Scaling Regulation. Consequently, the fact that stumpage or royalty accounts have been issued by the Ministry in respect of other scaled logs should not preclude the Ministry from later issuing separate accounts in respect of the logs that have been missed. Second, neither the Forest Act nor the Scaling Regulation specifically limits or qualifies the time when the regional manager may make an estimate, with reference to stumpage or royalty accounts or otherwise. The regional manager may invoke this provision at any time after

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the logs have been processed, sold or removed from the Province.

Third, the scope of the Ministry's authority to rectify an erroneous stumpage or royalty account is governed not only by the Forest Act but also by general contract law. Under the forest tenure system, authority to cut Crown timber is conferred through a variety of licences that are essentially contracts between the Crown and licensees. With regard to stumpage and royalty, section 81 and subsequent sections do not impose legal liabilities on licensees to pay these accounts. These provisions set out the ground rules for the calculations of the amounts. The licences impose a contractual obligation for licensees to pay, at rates calculated according to the Forest Act.

As a result, the Ministry's authority to rectify an erroneous account is not limited by the Forest Act, but is governed by general principles of commercial law. In this respect the Ministry, as agent for the Crown, has the same rights and remedies available to any private party to a commercial contract. Under its licences with the Crown, BCFP agrees to pay stumpage or royalty on the Crown timber it cuts. If the company has cut some timber that, due to an oversight, has not been scaled, the Ministry is not precluded from rendering an account for the timber after the error has been discovered. Section 87 simply provides the mechanics for making the estimate, where the timber is no longer available to be scaled.

In my opinion, the Ministry may properly issue stumpage and royalty accounts to BCFP for the logs that were not scaled, even though accounts for scaled logs have been issued and presumably paid.

The practice of the Ministy coincides with my interpretation of its authority to issue supplemental stumpage or royalty accounts. I understand that it is not uncommon for the Ministry to submit amended accounts to licensees to rectify an assortment of errors in computing stumpage. Unless a dispute arises over the accuracy of the changes, they are routinely paid by licensees. BCFP was billed separately for discrepancies in the scales that came to light during checking in the fall of 1981, which serves to confirm this practice.

Evidence in Estimating Unscaled Timber

In an excerpt from an internal memorandum from Mr. Apsey to the Minister of Forests quoted on page 7 of Dr. Friedmann's September 28th letter, Mr. Apsey expresses his doubt that a court would enforce the Ministry's claim against BCFP for additional stumpage based on an estimate of the unscaled volume "because of the circumstantial nature of the evidence".

Cont'd. . ./7

An estimate based on such things as the contractors' and BCFP's production records, and the checks carried out by independent scalers and the Ministry in the fall of 1981, would not be rejected out of hand by a court by reason only that such evidence is circumstantial in nature. The 1981 Supreme Court of British Columbia decision in Edjon Logging Ltd. v. Loewen Cedar Products Ltd. and Abe Loewen (Vancouver Registry No. C802287, McEachern C.J.S.C.) considered a similar issue relating to scaling. There, Edjon held a Timber Sale Licence from the Provincial Crown from which it logged cedar. Under the Licence, Edjon was obliged to pay stumpage to the Crown based on a metric scale carried out under the Forest Act. Edjon agreed to sell the cedar to Loewen according to a board foot scale ("fbm") to be performed by Leowen. The metric and fmb scales measure different characteristics of logs, so scales may not be converted readily from one to the other according to any fixed formula. After most of the logs had been sawn, a dispute arose over the accuracy of the fbm scale, with Edjon contending that it was too low. The Court accepted the Ministry of Forests' metric scale and found that the fbm scale was low. To rectify the erroneous fbm scale, the Court relied on discrepancies in piece counts and accepted expert testimony relating to typical ranges of conversion from metric to fbm.

While this decision relates to a dispute between private parties over a private log scale and not to the accuracy of a Ministry scale, it demonstrates that a Court will accept circumstantial evidence to rectify an erroneous scale. A litigant's success in persuading a Court to accept such evidence will, of course, depend on its relevence and reliability in individual cases.

Summary

My opinion can be summarized as follows:

1. The Ministry of Forests may not invoke section 87 of the Forest Act to estimate unscaled logs delivered to Shoal Island before January 1, 1979, but it may invoke its contractual and statutory rights under the former legislation to do so. These remedies are discretionary and not mandatory.

2. Logs that were missed by Ministry scalers on and after January 1, 1979 were not "scaled" within the meaning of the Forest Act and Scaling Regulation.

3. The regional manager may, if he wishes, invoke section 87 of the Forest Act to estimate the volumes of unscaled logs. He is not prevented from doing so by reason only that the logs went through the "scaling process" or that stumpage and royalty accounts were issued in respect of scaled logs that were delivered at the same time.

Cont'd. . ./8

4. I am unable to provide a firm and unqualified opinion about the mandatory effect of section 87.

5. A Court will accept circumstantial evidence relating to unscaled logs or improperly scaled logs when adjudicating a dispute over log scales.

I would be pleased to discuss this opinion with you if you require further explanation.

Yours truly,

Richard Campbell

RSC/bkwr

To date I have received no substantive response, only a verbal confirmation that my report has been received and is under discussion. This issue is a serious one, and one which has caused grief and financial loss for the contractors as well as lost revenues for the Province. I have waited a fair period of time, but I am unwilling to allow the matter to go on indefinitely. With this report I am not only advising you of the situation, but also requesting that you muster whatever power you have available to you to rectify the wrong done to both the contractors and the Province.

The details of my investigation can be found in the Appendices to this report; what follows is a summary of my conclusions.

1. <u>The Ministry's scaling procedures at Shoal Island were deficient in significant respects during the 1978-1981 period.</u>

I have already described how the scaling was done. The integration of the scaling into the sorting process coupled with the pressure to speed up the operation increased the likelihood that logs would be missed in the scaling process, and eliminated the possibility of a second scale. The second scale procedure is important, for it is the means established in the Forest Act by which a person whose interests are affected by a scale can have a scale checked when he believes it may be inaccurate. The Forest Act provides that when inaccuracy is suspected, the timber is to be scaled a second time, and if the difference between the first and second scale is greater than 3%, the second scale is taken as the official scale.

Province of British Columbia

OFFICE OF THE DEPUTY MINISTER

Ministry of Forests

Parliament Buildings
Victoria
British Columbia
V8W 3E7

January 6, 1984

File: 160-7 Scaling
Shoal Island

Dr. Karl Friedmann
Ombudsman
8, Bastion Square,
Victoria, B.C.
V8W 1H9

Dear Sir:

Re: Shoal Island

Reference is made to your letter of December 19, 1983 and enclosures.

I have now had an opportunity to consider your most recent request and obtain further advice from the Ministry of Attorney General with respect to the interpretation of section 87 of the Forest Act. The Ministry of Attorney General has confirmed its advice that section 87 has no application to the circumstances at hand but even assuming for the moment that it did, I must advise that I would not be prepared to issue a new stumpage account on the basis of the information submitted in support of the contractor's claims.

By issuing a new account the Ministry would be conceding that its scale returns are inaccurate in the amount of the new billing. The Ministry makes no such concession. The Ministry's scale returns are based on actual physical inspection while the contractor's estimates, which you suggest be used as the basis for the new billing, are based on average load size and are not supported by empirical data. As you probably know a stumpage account under the Forest Act is subject to a right of appeal. It would be irresponsible of the Ministry to issue an account that it could not justify on appeal, particularly where, as in the case at hand, the licensee has advised it would appeal any further accounts relating to Shoal Island scaling.

In short, we feel the Ministry's existing scale returns provide a more accurate estimate of the timber delivered to Shoal Island than any alternatives suggested to date. All the data submitted thus far is more concerned with discrediting the existing scale returns than with providing a justifiable alternative. While we can accept that scale returns like any estimate may be subject to criticism it would be foolhardy to abandon them unless a more reliable method of estimation can be demonstrated. Accordingly, I am unable to accede to your request at least on this aspect of your recommendations.

You also requested "specific information" on the volumes of Crown Timber processed through five other dry land sorts "without first being scaled" as well as the total volume of Crown Timber processed through Shoal Island between July 1978 and December 1981. Your request makes certain assumptions we cannot agree with, however, I have requested Mr. Hutchings of the Valuation Branch to make available to you copies of all scale returns for the period in question so that you can extract the information you require.

Yours truly,

T. M. Apsey,
Deputy Minister.

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

January 11, 1984

Mr. Bert Hick
Secretary to Cabinet
Parliament Buildings
Victoria, B.C.
V8V 1X4

Dear Mr. Hick:

Enclosed herewith are twenty copies of the Ombudsman's Report to the Lieutenant Governor in Council concerning the Ministry of Forests' scaling procedures at Shoal Island.

This complaint was initiated by a number of logging contractors whose financial positions have been adversely affected by faulty scaling procedures. Some of these contractors are now in very difficult financial situations, and for that reason I would appreciate it if this matter could be brought to the attention of the Lieutenant Governor in Council as soon as possible.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Enclosures

REPORT OF THE OMBUDSMAN

TO

THE LIEUTENANT GOVERNOR IN COUNCIL

RE: SHOAL ISLAND SCALING PROCEDURES

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

January 11, 1984

The Honourable W.R. Bennett, P.C.
Premier of the Province of British Columbia
Parliament Buildings
Victoria, B.C.
V8V 1X4

Dear Sir:

Pursuant to section 24(1) of the Ombudsman Act, R.S.B.C. 1979, c. 306, I submit herewith a report of my investigation of the complaint of six logging contractors concerning the Ministry of Forests for consideration by the Lieutenant Governor in Council.

I am available to discuss this matter with the Lieutenant Governor in Council or a Committee of Council at your convenience. Because of the urgency of this matter I respectfully request your response as soon as possible.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Enclosure

TABLE OF CONTENTS

1. REPORT

2. RECOMMENDATIONS

3. LIST OF APPENDICES

REPORT

TO

THE LIEUTENANT GOVERNOR IN COUNCIL

PURSUANT TO SECTION 24(1) OF THE OMBUDSMAN ACT
R.S.B.C. 1979 c. 306

Re: In the matter of a complaint made by a number of logging contractors that the Ministry of Forests, through the establishment and implementation of a faulty scaling procedure at Shoal Island, failed to scale a significant volume of Crown timber, and that as a result both the contractors and the Province have been underpaid several millions of dollars for the harvesting of Crown timber.

In December, 1982 I received a complaint from Traer and Mahood Contractors Ltd. about problems arising out of the Ministry of Forests' scaling operation at B.C. Forest Products Ltd.'s dry land sort at Shoal Island. I subsequently received complaints either directly or indirectly from other logging contractors who, like Traer and Mahood, had harvested and delivered logs to Shoal Island for B.C. Forest Products Ltd. (BCFP): Kyuquot Logging Ltd., John Reid and Associates Ltd., G.W. Cox and Sons Logging Ltd., and Dougan Logging Ltd.

Each of these companies had logged Crown timber for BCFP and delivered it to Shoal Island where it was to be scaled by Ministry of Forests' scalers. Under the terms of their contract with BCFP, the contractors were to be paid on the basis of the Ministry's scale. The contractors complained to me that because of the scaling procedure the Ministry established at Shoal Island, and because of the manner in which the Ministry scalers carried out their work, several hundred thousand cubic metres of Crown timber were processed through Shoal Island without first being scaled. They estimated that because of the Ministry's faulty procedures, they were underpaid between 4.5 and 6.3 million dollars. They further contended that by not scaling this Crown timber, the Ministry of Forests failed to collect between one and four million dollars in unpaid stumpage fees which BCFP owes the Province for its use of Crown timber.

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In the initial six months after I received this complaint, the complainants continued to meet with Ministry officials in an effort to reach a resolution, and the Minister of Forests directed his staff to undertake an internal investigation of the matter. During this period my staff monitored progress on these activities. In August, 1983 the Ministry advised the contractors that it had completed its investigation and that no further scale accounts would be issued to BCFP. This was not satisfactory to the complainants, nor to me, as I felt that adequate explanations had not been provided on a number of significant issues.

I commenced a detailed investigation of the matter at this point. My staff have obtained information from Ministry files, from documents provided by the complainants, and from discussions with Ministry staff in Victoria and Vancouver as well as with the complainants. Additionally, I considered it prudent to seek a legal opinion on the matter from a source outside my office. I have reviewed the information obtained through all of these various sources, and the representations which I subsequently received from both the Ministry and BCFP, and I have concluded that the complaint is substantiated.

The final report of my investigation is attached as Appendix A. The report is somewhat lengthy, and goes into the matter in a fair amount of detail; however, I considered this treatment necessary not only because of the complexity of the matter, but also because of the amount of money involved. The following is a summary of the main points; further detail on each of these points is found in the report in Appendix A.

- BCFP commenced operations at its dry land sort at Shoal Island in mid-1978. Crown timber was harvested and brought to the dry land sort by BCFP and by contractors working for BCFP. As is required by the Forest Act, the Ministry of Forests established the scaling procedure, and was responsible for carrying out the scaling of the logs.

- The contractors kept records of the volumes of timber they harvested for BCFP. Such records are required under Section 149 of the Forest Act; additionally, contractors use such records to ensure that they receive correct payments. The contractors generally recorded this information in terms of truck loads delivered to the dry land sort.

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- There is a time lag of several months between delivery of logs to the sorting ground and receipt of the scaling returns from the Ministry. Some time after scale returns started coming in, contractors became dissatisfied with the volumes for which they were paid (i.e. the scaled volumes), and met with BCFP on the matter. In some cases the scaled volumes were 10%-12% below the volumes indicated by the contractors' records.

- In mid-1981 one of the contractors employed an independent scaler to check the work of the Ministry scalers. He did this without the knowledge of the Ministry scalers, or of BCFP, and found that the scale volumes produced by Ministry scalers were about 11% lower than his calculations.

- Subsequent checkscales were made involving BCFP, the Ministry and independent scalers, but with the knowledge of the Ministry scalers. These checks showed that Ministry scalers still missed between 3% and 6% of the logs delivered to the sort. At the end of 1981 the Ministry changed its scaling procedures at Shoal Island so as to correct the major deficiencies in the system.

- The contractors obtained the assistance of a professional forester to estimate the volume of timber harvested and delivered by the contractors, but not represented in the scale returns. The forester estimated this volume at 226 064 cubic metres.

- There is wide recognition within the Ministry that the scaling procedures and practices at Shoal Island were deficient and that a significant volume of Crown timber was not scaled as a result. This recognition is documented in my report.

- Section 87 of the Forest Act provides a means through which the Ministry could correct the problems which have resulted from its faulty scaling. This section allows the Ministry to estimate the volume of Crown timber which was processed, sold or removed from the Province without first being scaled, and to multiply that volume by the applicable stumpage rate so as to determine the amount of stumpage due to the Province. This process results in an additional scale return being issued to the licensee (in this case BCFP), and both the Province and the contractors are paid on the basis of the scale return.

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- The Ministry of Forests has refused to apply Section 87. It has stated that it has advice from the Ministry of the Attorney General that Section 87 is not applicable to the Snoal Island situation; however, it has refused to provide me with a complete copy of that opinion. I have also sought a legal opinion on this issue, from Mr. Richard Campbell, Esq., who confines his practice to forestry law. He advised that Section 87 does indeed constitute an appropriate remedy. That opinion has been provided to the Ministry and is attached to Appendix A.

- The essence of my recommendations to the Ministry was that the Ministry prepare an estimate of the unscaled volume of timber in consultation with BCFP and the contractors and use that estimate as the basis for issuing a new scale return.

The Ministry has refused to accept my recommendations. In its response of January 6, 1983 (Appendix B) the Ministry has advanced three types of arguments:

i) The Ministry of the Attorney General has opined that Section 87 is not applicable to this case;

ii) even if Section 87 were applicable, the figures provided by the complainants are not considered as accurate an estimate as the Ministry's scale returns;

iii) scale returns can be appealed, and in this case the licensee (BCFP) has already stated that it would appeal any further accounts; the Ministry considers it would be irresponsible to issue an account it could not justify on appeal.

I have addressed the first of these arguments in my report and in my previous correspondence with the Ministry. I do not consider it valid and the Ministry has thus far refused to provide any additional information in support of its legal opinion.

With respect to the second argument, I must make two points: first, the Ministry has not denied that a volume of Crown timber went through Shoal Island without being scaled (in fact, file documents acknowledge this), and second, I did not recommend that the complainants' figures necessarily be used as the estimates of the unscaled volume. Both my preliminary and my final reports indicated a number of items which must

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be addressed in order to determine the quantity of unscaled timber. But to date the Ministry has not raised any substantive arguments to counter the data provided by the complainants, and in view of the known inaccuracy of the Ministry scale returns in my view the complainants' estimates provide a good basis from which the Ministry could derive its estimate.

In its third point, the Ministry seems to be saying that it refuses to issue a further scale account because it knows BCFP would appeal the scale. I find this argument to be particularly distasteful. It is known that the existing scale returns are incorrect; yet, as is shown in my report, the contractors never had an opportunity to appeal those scales. Again, my recommendation was that the Ministry prepare an estimate of the unscaled volume in consultation with BCFP and the contractors. With its expertise in scaling, the Ministry should be able to produce an estimate it can justify. I cannot accept that the Ministry would refuse to fulfill its responsibilities merely because a licensee has stated an intention to appeal. I should also note that I have advised the Ministry about a recent judgment in which the Supreme Court of British Columbia relied on discrepancies in log counts and accepted expert testimony to rectify an erroneous scale.

As a result of my investigation I have concluded that the Ministry of Forests' refusal to act is unjust, in that it is causing significant harm both to the contractors and to the Province. Using the contractors' estimates of unscaled volumes, they have been underpaid approximately 4.5 to 6.3 million dollars. Perhaps even more alarming is the fact that as a result of the Ministry's refusal, the Province has also been underpaid by one to four million dollars for Crown timber processed but not scaled at Shoal Island. This figure could also be much larger, since the same faulty scaling procedures were, or are, in effect at five other dry land sorts throughout the Province.

The Ministry of Forests has a responsibility to manage the Province's timber resources for the benefit of the Province. When the Ministry permits Crown timber to be harvested, it is required to collect the stumpage or royalty fees due to the Crown Provincial. In this case BCFP, and perhaps other forest products companies, have harvested and have had the use and benefit of Crown timber, but because the Ministry did not scale all of the timber, the Province has not received the revenue to which it is entitled. I have recommended that the Ministry take the necessary and appropriate corrective action, and it has refused.

...6

I now seek your assistance in this matter. I would request that the Ministry of Forests be directed to take the corrective action outlined in my recommendations. I have attached not only my recommendations and final report, but also all of the related correspondence I had with the Ministry and with BCFP. I shall also attempt to respond to requests for any further information which may be required.

Yours sincerely,

Karl A. Friedmann
Ombudsman

January 11, 1984

RECOMMENDATION

That the necessary steps be taken to ensure implementation of the following recommendations made pursuant to section 22 of the Ombudsman Act, R.S.B.C. 1979, c. 306.

1. that the Ministry of Forests prepare an estimate of the unscaled timber processed through Shoal Island during the period July 1978 to December 1981;

2. that the Ministry provide BCFP and the contractors with its estimate, and with information on the means by which the estimate was developed;

3. that the Ministry consider any representations received from the affected parties before finalizing its estimate; and

4. that the Ministry issue additional scale returns and invoices to BCFP on the basis of this estimate.

LIST OF APPENDICES

A Final Report and associated correspondence:

* - Covering letter to T.M. Apsey from the Ombudsman, 1983.12.19.
* - Final Report: Ombudsman Investigation of Shoal Island Scaling, 1983.12.19.
- Legal Opinion provided to Ombudsman by Richard Campbell, Esq., 1983.11.30.
- Letter to T.M. Waterland from the Ombudsman, 1983.12.19.
- Letter to M.E. Hoole of B.C.F.P. from the Ombudsman, 1983.12.19.
- Letters to complainants from the Ombudsman, 1983.12.19.

B Ministry of Forests' response to Ombudsman's Final Report, 1984.1.6.

C Request for legal opinion of Ministry of the Attorney General:

- Letter to T.M. Apsey from the Ombudsman, 1983.8.5.
- Response to Ombudsman from T.M. Apsey, 1983.8.29.
- Letter to T.M. Apsey from Solicitor for Ombudsman, 1983.11.28.
- Response to Solicitor for Ombudsman from T.M. Apsey, 1983.12.19.

D Preliminary Report and associated correspondence:

- Preliminary Report: Letter to T.M. Apsey re Shoal Island Scaling, 1983.9.28.
- Letter to T.M. Waterland from Ombudsman, 1983.9.28.
- Letter to M.E. Hoole of B.C.F.P., 1983.9.28.
- Letters to complainants, 1983.9.28.

E Response to Preliminary Report:

- Letter to Ombudsman from T.M. Apsey, 1983.10.18.
- Letter to Ombudsman from M.E. Hoole, 1983.10.13.
- Response to M.E. Hoole from Ombudsman, 1983.11.17.

* Only items marked with an asterisk have been included in this section of Special Report to Legislative Assembly.

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
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V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

File No: 82 09119

December 19, 1983

Mr. T.M. Apsey
Deputy Minister
Ministry of Forests
1450 Government Street
Victoria, B. C.
V8W 3E7

Dear Mr. Apsey:

Re: Shoal Island Scaling

On September 28, 1983 I wrote to you in some detail to advise you of my preliminary conclusions with respect to the Shoal Island complaint, and to advise you of the recommendations I was considering. That letter also provided you with an opportunity to make representations on any of the issues I had raised. Your October 18, 1983 response addressed only the applicability of Section 87 of the Forest Act to the Shoal Island situation. You indicated that the Ministry of Attorney General had advised you that Section 87 was intended to cover a situation in which logs were processed or exported without being scaled, and not to cover a situation in which logs were missed during the scaling process. The Ministry of Attorney General's conclusion was that the Ministry could not send a further account to BCFP pursuant to Section 87 and on that basis you decided to take no further action on the matter.

I considered your comments and decided to seek further legal advice from a source outside my office. I contacted Mr. Richard Campbell, Esq., who confines his practice to forestry law, and requested that he provide me with a legal opinion on a number of issues related to the applicability of Section 87. I have now received his opinion and attach it for your information. You will note that Mr. Campbell has concluded in part that:

> "The regional manager may, if he wishes, invoke Section 87 of the Forest Act to estimate the volumes of unscaled logs. He is not prevented from doing so by reason only that the logs went through the "scaling process" or that stumpage and royalty accounts were issued in respect of scaled logs that were delivered at the same time."

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In short, Section 87 does constitute a remedy, and does not prevent you from taking action to correct the problem created at Shoal Island.

I have now finalized my conclusions, and you will find the complete report of my investigation attached. In summary my findings are as follows:

- The Ministry of Forests established the scaling procedures at BCFP's dry land sort at Shoal Island, and Ministry scalers were responsible for the scaling of Crown timber at the site.

- The scaling procedures were deficient in a number of ways, and as a result, during a 3 1/2 year period, a volume of Crown timber was processed through the dry land sort without being scaled.

- The Ministry scale formed the basis on which stumpage was charged, and on which contractors were paid for their logging. However, the Province was not paid stumpage on the unscaled volume of Crown timber, and the contractors were not paid for logging it - although BCFP did benefit from the use of the timber.

- Because of the Ministry of Forests' deficient scaling, both the Province and the contractors have suffered. The contractors have estimated that 226,064 cubic metres of timber they harvested and delivered to Shoal Island was unscaled, and that as a result, they have been underpaid from $4,521,280 to $6,329,792. The unpaid stumpage on this volume (at $6 - $9 per cubic metre) ranges from $1,356,384 to $2,034,576; and this amount doubles if BCFP employees (independent of the contractors) harvested and delivered an equivalent volume of Crown timber to Shoal Island.

- Section 87 of the Forest Act applies to situations in which timber was processed or exported without being scaled. In such situations the Ministry is to estimate the volume of unscaled timber, apply the appropriate stumpage rates, and invoice the licensee on the basis of that estimate. Section 87 is an appropriate remedy for timber processed through Shoal Island after January 1, 1979. For timber processed prior to that date a similar procedure could be used since that was, in fact, the Ministry's practice prior to the coming into force of the current Forest Act.

- The Ministry's decision to not apply Section 87 is unjust, and detrimentally affects both the Province and the contractors. The Ministry should take immediate action to correct this situation.

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Additionally, in my last letter I pointed out that similar scaling procedures had been in place at five other dry land sorts, and apparently are still in effect at one of those locations. I had requested that you provide me with specific information on the volumes of Crown timber which might have been processed through those dry land sorts without first being scaled. You did not respond to this request, nor to my request for data on the total volume of Crown timber processed through Shoal Island between July, 1978 and December, 1981. Please provide this information in your response to this letter.

My recommendations with respect to the Shoal Island complaint are listed at the end of the attached report. These recommendations are made pursuant to Section 22 of the Ombudsman Act. I would also request, as provided for in Section 23 of the Ombudsman Act that you notify me by January 6, 1984 of the steps you intend to take to give effect to my recommendations. I consider this to be a reasonable period of time for your response since you have had my preliminary findings before you since September 28, 1983, and my final report does not differ substantially from my preliminary findings. If I have not had an adequate response by January 6, 1984, I will have to consider making a report to the Lieutenant Governor in Council, pursuant to Section 24 of the Ombudsman Act.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Attachment

c.c.: T.M. Waterland, Minister

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
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Telephone: (604) 387-5855
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OMBUDSMAN INVESTIGATION OF SHOAL ISLAND SCALING

THE COMPLAINT

I have received a complaint about the Ministry of Forests' scaling procedures at Shoal Island. Briefly, the complaint is that the Ministry of Forests failed in its duty to properly scale Crown timber, and that this failure has had two important and negative consequences:

- the contractors who logged the timber were significantly underpaid for their efforts;

- the Ministry did not collect a significant amount of money in stumpage fees owed to the Province for the use of Crown timber.

The complaint was brought to me by contractors who worked under contract for B.C. Forest Products Ltd. (BCFP) during the 1978-1981 period, logging Crown timber which was brought into BCFP's dry land sort at Shoal Island: Traer and Mahood Contracting Ltd., Kyuquot Logging Ltd., John Reid (for Quatam Logging and J.R.B. Contractors), G.W. Cox and Sons Logging Ltd., and Dougan Logging Ltd.

The Crown timber which they logged for BCFP was taken to the dry land sort at Shoal Island, where it was scaled by Ministry of Forests scalers. The scale produced by the Ministry of Forests scalers served as the basis for determining the amount of stumpage or royalty fees owed to the Province by BCFP for the logging of Crown timber. Also, under the terms of the contract between BCFP and the contractors, the scale served as the basis upon which BCFP paid each contractor for his logging operations.

By comparing the scale results of truck loads of timber delivered to the Shoal Island dry land sort with the scale results of earlier deliveries, the contractors came to the conclusion that a proportion of the timber which they had logged and delivered to the dry land sort had not been scaled. The contractors enlisted the assistance of a professional forester, T.M. Thomson to help them prepare an estimate of the extent of the underscale.

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Thomson estimated that Ministry of Forests scalers had failed to scale 226 064 cubic metres of the Crown timber which the six contractors had harvested and delivered during a three and a half year period. Using a contract rate ranging from $20.00 to $28.00 per cubic metre, this would mean that the contractors were underpaid a total amount ranging from $4,521,280.00 to $6,329,792.00.

If Ministry scalers failed to scale this volume of Crown timber, the Ministry also failed to collect the stumpage which should have been charged BCFP for the use of Crown timber. Using a stumpage rate ranging from $6.00 to $9.00 per cubic metre, this would mean that the Ministry had failed to collect between $1,356,384.00 and $2,034,576.00 in stumpage on timber which the contractors delivered to Shoal Island, but which was not scaled.

Moreover, the amount of uncollected stumpage could be significantly higher. The complainants have stated that they logged about half of the Crown timber brought into Shoal Island, with the remainder being logged by BCFP. Since the same scaling procedures were applied, one could expect that a similar volume of timber harvested by BCFP employees was also left unscaled, and thus the above estimate of uncollected stumpage at Shoal Island would double.

Additionally, during the course of my investigation, I became aware that there are other dry land sorts where a scaling procedure similar to that used at Shoal Island is or was in effect. I understand that there are five other such locations and that the scaling procedures at four of these locations were subsequently changed; however, in the case of the Eve River dry land sort the procedure remains the same. Although I have requested comments from the Ministry on the volume of timber which might have been processed through these dry land sorts without first being scaled, I have received no response, and at present I am unable to estimate the additional uncollected stumpage which this might represent.

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BACKGROUND

The relevant events leading up to this complaint are as follows:

1. In July, 1978, BCFP commenced operation of a dry land sort at Shoal Island. The logs brought into the dry land sort were Crown timber harvested from various locations within BCFP's licence areas. The logs were towed to the island by water, and were to be scaled by Ministry of Forests scalers. The scaling and the sorting of the logs were integrated into the same process through the following steps:

   a) Bundles of logs were brought out of the water, the straps removed, and the logs spread out loosely in rows 250-300 feet in length.

   b) A BCFP employee would grade the logs, marking them with paint to indicate the sorts into which the logs would eventually be put. There were about 20 different sort codes (fir sawlog, cedar shingle, etc.)

   c) Four or five Ministry scalers then walked around the row of logs to do the scaling. Each scaler was responsible for scaling a number of different sorts, and had a different tally for each sort. (For example, if scaler A was to scale timber marked for fir sawlogs, cedar shingles, large cypress and pine sawlogs, he would have four tallies, one for each sort).

   d) The scaler was to record the volume of all of the logs in each of his log sorts on the appropriate tally. Tally sheets remained open until complete, so that logs from a number of different bundles could be included on one tally sheet.

2. Kyuquot Logging Ltd. had been logging for BCFP for a number of years before the Shoal Island dry land sort was put into operation. However, after 2-1/2 years at Shoal Island, Kyuquot found that its contract rates with BCFP were no longer sufficient to provide an adequate level of financial return. Kyuquot was unable to negotiate another mutually satisfactory rate with BCFP, and lost the contract. The contract was instead awarded to Traer and Mahood at the beginning of 1981.

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3. Traer and Mahood received their first scale returns in April, 1981. Using truck load averages from past experience, Traer and Mahood had calculated the volume of wood which they had logged and removed for BCFP. However, the scale volumes provided by the Ministry of Forests were 10%-12% below the volumes calculated by Traer and Mahood.

4. Traer and Mahood hired an independent scaler, Shadforth, to determine the extent and cause of the scaling discrepancy at Shoal Island. Shadforth spent two weeks on this project during May, June and July, 1981, without official permission from BCFP. During that time Shadforth scaled 37 load bundles of logs which had been harvested by Traer and Mahood, and confirmed that the load bundles for small and large trucks were very similar to the truck load averages attained by Traer and Mahood in previous years. At this point the Ministry scalers did not know their work was being checked, and the scale volumes produced by the Ministry scalers were about 11% lower than the volumes calculated by Shadforth. However, the project was discontinued when BCFP learned of it and objected to it.

5. Traer and Mahood advised BCFP of the results of Shadforth's work and of their estimate that 10% to 12% of the timber which they had harvested had not been scaled by the Ministry scalers. BCFP then agreed to join Traer and Mahood in a further examination of the accuracy of the scaling.

6. Between September 1st and 4th, 1981, two independent scalers (Shadforth representing Traer and Mahood, and Woodrow representing BCFP) checked the work of the Ministry of Forests scalers. The Ministry scalers were now aware that their work was being checked, and certain procedural changes were implemented to facilitate the check. The results were as follows:

	Pieces	Volume
Shadforth	7146	9 586.1 m^3
Woodrow	7169	9 269.7 m^3
Ministry	6763	8 860.0 m^3

This indicated that the Ministry scalers had still missed between 5% and 6% of the logs in the three booms that were examined.

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7. BCFP provided this information to the Ministry of Forests and a decision was made to conduct a Ministry check scale. This check scale was conducted between September 21-25, 1981, and involved five Ministry check scalers checking five Ministry scalers. As well, Shadforth conducted a scale on behalf of Traer and Mahood, and a BCFP employee did a piece count of the logs. The results were as follows:

	Pieces	Volume
Shadforth	9704	12 624.0 m^3
BCFP	9756	-
Ministry	9416	11 853.7 m^3
Ministry check	9385	11 938.7 m^3

It appeared from these results that the Ministry scalers had missed about 3% to 4% of the logs (using Shadforth or BCFP for comparison). Again, as in the above case, the Ministry scalers knew they were being checked.

8. From these results, the Ministry concluded that the scaling procedures appeared to be faulty. The Superintendent of Scaling for the Vancouver Region stated:

> "The results of this checkscale indicated to us that very likely we had a scaling procedure problem and not a problem in scaling by individual Forest Service scalers. It is most important to remember at this time that the original scalers knew they were being checkscaled and certainly were doing their best to do an accurate scaling job."

9. Between October 5th and 9th, 1981, the Ministry conducted still another check, this time without the involvement of private scalers. The actual number of logs was determined independently and kept confidential until the scaling was completed. The results of this check are as follows:

	Pieces	Volume
Ministry	9117	12 643.8 m^3
Ministry Check	9122	12 772.8 m^3
Ministry Official Counter	9321	-

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As in the above case, the Ministry scalers knew they were being checked. Also as in the above case, the Ministry scalers and check scalers produced very similar results, but both had missed about 2% of the logs, as calculated by the official count.

10. Through negotiations with BCFP, many of the contractors obtained a rate adjustment to their contracts in October 1981, increasing the rate they were paid for each cubic metre of timber delivered during 1981. There does not appear to be an explicit statement of the reason for the rate adjustment, and the change applied only to timber delivered during 1981. Most of the contractors also signed a waiver agreeing not to bring any further actions against BCFP for compensation for logs delivered to BCFP. This rate adjustment resulted in cash amounts being paid by BCFP to many of the contractors.

11. In December 1981, the Ministry issued to BCFP four scale and royalty invoices for "check scale adjustments". These invoices were derived from the three checks made in September and October, 1981, and included the following increases:

	Pieces	Volume	Stumpage or Royalty
(for Sept.1-4)	383	501.8 m^3	$1,604.88
(for Sept.21-25)	288	362.6 m^3	$1,249.81
(for Oct.5-9)	204	282.9 m^3	$ 571.55
Totals	875	1 147.3 m^3	$3,426.24

The adjustments to the piece counts were obtained by comparing the Ministry count with Shadforth's in the first two cases, and with the Ministry's official count in the third case. The volume adjustments were not obtained in the same manner, but instead were derived by multiplying the piece count by Ministry figures for average log volumes. It should be noted that no Ministry check scaler was involved in the September 1-4 check, and that the Ministry used Shadforth's count as the basis for the adjustments for both the September 1-4 and the September 21-25 checks.

12. In January 1982 new scaling procedures were implemented at Shoal Island to improve the scaling accuracy and to increase the checkability of the scaling.

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13. However, many of the contractors did not feel that the change in the scaling procedures, the supplementary invoices, and BCFP's rate adjustment adequately compensated either the contractors or the Province for the logs which had been missed. After a number of discussions, two of the contractors wrote to the Ministry on March 7, 1983 requesting an investigation of the problem at Shoal Island with a view to issuing supplementary stumpage invoices under Section 87 of the Forest Act.

14. The Minister of Forests requested that his staff undertake a thorough investigation of the matter. The contractors retained the services of a forestry consultant, T.M. Thomson, to assist them in developing an estimate of the level of the underscale for each of the six contractors who had brought logs into the dry land sort during the 1978-1981 period. Thomson's report was then made available to the Ministry. Ministry staff reviewed the Thomson report, discussed the matter with the contractors, and interviewed scalers. The Ministry also requested information from BCFP, but BCFP did not provide the information.

15. Ministry of Forests staff completed their study in May, 1983. The Deputy Minister's May 19, 1983 memorandum to the Minister of Forests spelled out the options which appeared available to the Ministry, and made a recommendation on those options:

> "Two options are now open to the Ministry. The first option is to accept that certain volumes have not been invoiced and to invoice British Columbia Forest Products Ltd. for the volume not scaled. The second option is to take no action on the basis that we do not know what volume, if any, passed through Shoal Island unscaled.
>
> If the Ministry is to take action under the first option a reasonably accurate estimate of the unscaled volume must be made. The testimony of witnesses under oath is not possible to eliminate areas of doubt. A minimal volume of 85 000 m^3 would be invoiced with stumpage charges of about $500,000. The contractors are asking that 226 064 m^3 be invoiced with stumpage charges of about $1,500,000. Company personnel have already stated that additional payments will not be made unless ordered by a court and there is doubt that a court would support such action by the Ministry because of the circumstantial nature of the evidence.

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If the Ministry takes no action then the contractors may go to court, or ask the Ombudsman to intercede on their behalf. In either event the investigator would have powers to obtain evidence under oath and order that documents be produced.

Recommendation:

That the contractors be advised that the Ministry cannot determine what volumes, if any, passed through Shoal Island unscaled."

16. On August 2, 1983, the Minister of Forests wrote to the two contractors who had requested that Section 87 of the Forest Act be applied. The Minister advised that he was unable to find any basis upon which to change the estimates determined by the scale returns already issued. He also stated that he had been advised by the Ministry of the Attorney General that Section 87 did not apply to the Shoal Island situation because a scale had taken place and only its accuracy was being questioned.

17. On August 5, 1983, I wrote to the Deputy Minister of Forests, requesting that he provide me with a copy of the Ministry of the Attorney General's legal opinion respecting the application of Section 87. Mr. Apsey responded on August 29th, stating that the opinion was considered privileged and confidential information between Mr. Waterland and his solicitor, and that it was not possible to provide me with a copy. I subsequently pointed out that Mr. Waterland, as a client, is quite free to provide me with a copy of his solicitor's opinion; however, he chose not to do so, and under these circumstances, it is incorrect to state that it was not possible to provide me with a copy.

18. On September 28, 1983 I wrote to the Deputy Minister advising him in considerable detail of my findings on the Shoal Island complaint, of my preliminary conclusions, and of the recommendations I had under consideration. That letter was written pursuant to Section 16 of the Ombudsman Act, which requires that when it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation which might adversely affect an authority or person, the Ombudsman must inform the person or authority of the grounds, and must give them an opportunity to make representations before finally deciding the matter. I also provided BCFP and the Minister of Forests with a copy of my letter.

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19. On October 13, 1983, BCFP responded to my letter. The response did not comment on the specifics of my letter, but instead was primarily concerned with the privacy of BCFP's relationship with its contractors, and with the confidentiality of information pertaining to that relationship. In addition, BCFP expressed the view that Section 87 of the Forest Act did not empower the Ministry of Forests to issue new or supplemental invoices, and that if this action were attempted, BCFP would take legal action to prevent it.

20. On October 18, 1983, the Deputy Minister of Forests responded to my letter. Again, the response did not comment on the specifics of my letter. Instead, the Deputy Minister cited part of the Ministry of the Attorney General's legal opinion to which I had earlier been refused access. The gist of the partial opinion was that the Ministry of Forests could not send BCFP a further invoice pursuant to Section 87 of the Forest Act. I should note that my solicitor has advised me that one may not selectively claim privilege by providing part of a legal opinion and refusing access to the remainder. My solicitor has advised the Deputy Minister of this, and has requested the remainder of the Ministry of the Attorney General's opinion.

21. After considering the comments of both BCFP and the Deputy Minister of Forests, I sought additional legal advice on the applicability of Section 87 to the Shoal Island situation. I contacted Mr. Richard Campbell, Esq., who confines his practice to forestry law, and he has advised me that Section 87 is applicable to the determination of an estimate of the volume of timber scaled at Shoal Island after January 1, 1979, when the "new" Forest Act became effective. I have attached a copy of Mr. Campbell's opinion.

RELEVANT LEGISLATION AND REGULATIONS

Part 6 of the Forest Act pertains to the scaling of timber, and Part 7 pertains to the payment of royalty or stumpage. Certain sections of both of these parts are relevant to this case.

From Part 6, which deals with scaling, I have noted the following:

- Section 73(1)(b) requires that Crown timber be scaled by a Forest Service scaler;
- Section 74(1)(a) requires that timber be scaled according to prescribed procedures;
- Section 77(1) provides that:

  "...Where a person who has had a scale performed under Section 73 or whose interest is affected by a scale performed under Section 73

  (a) in a notice served on the regional manager objects to the scale return completed for the scale... the regional manager shall have the timber scaled again and a second scale return prepared".

Part 7 deals with the payment of stumpage, and Section 87 is relevant:

> "Where Crown timber on which royalty or stumpage is payable is processed, sold or removed from the Province without first being scaled under Part 6, the amount of royalty or stumpage payable shall be calculated by multiplying;
>
> (a) the regional manager's estimate of the volume of timber; by
>
> (b) the rate of royalty or stumpage...that the regional manager considers would have applied if the timber had been scaled under Part 6.

The Scaling Regulation (B.C. Reg. 563/78) includes many details of the scaling requirements. It requires that timber be scaled as soon as possible after it is cut, and it specifies the steps to be followed in scaling each log. For example, it states that a scaler shall use a scale stick to measure the diameter of each end, and shall record the radius of each end. Similarly, the length of each log is to be measured and recorded.

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FINDINGS

Scaling Deficiencies:

Through my investigation, I have determined that the Ministry's scaling procedures at Shoal Island were deficient in significant aspects. Among the more important deficiencies were the following:

- The incoming bundles were not scaled as a unit; instead, the scaling was done simultaneously by several scalers according to outgoing sort. This decreased control over the scaling to such an extent that it was likely that logs would be missed.

- The tallies were kept according to outgoing sort as well, with the result that tallies were kept open for varying lengths of time, depending on the volume in the different log sorts. Tallies kept open for longer periods of time tended to become less legible because of weather conditions and handling.

- The scalers did not mark each log to indicate that it had been scaled, as required by the regulations; it was therefore impossible to know whether any particular log had been scaled.

- The operation was a very fast one, and the scaling was subsumed within the sorting procedure. As a result there was considerable pressure on the scalers to complete their work quickly so that the timber could be placed in the outgoing booms. This increased the possibility that logs would be missed because of the rush, or even because a scaler was late for work or missed a shift.

- The timber was then placed in different outgoing booms; this made it virtually impossible to reassemble the original bundle for the purposes of either a check scale or a second scale.

Statements made by Ministry staff, and documents obtained from Ministry files indicate that there is general acceptance and recognition within the Ministry of the fact that a volume of timber passed through Shoal Island without being scaled. For example, the memo written to Assistant Deputy Minister MacPherson by the Superintendent of Scaling in November, 1981 provides the results of the various check scales which had been made, and concludes:

> "The scaling procedure at Shoal Island could not continue, as a weakness in the system had been proven."

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In December, 1981, the Scaling Policy Forester made the following comments to the Director of the Valuation Branch in response to a question as to why the Forest Service scale was consistently lower than the private scale:

> "I believe a contributing factor to the inaccuracy of scale at Shoal Island is the complexity of recording required by the present system ... Logs are not being marked as scaled and omission, or a duplication of scale is possible.
>
> The fact that the Forest Service scalers are consistently low may be due to sampling chance or there may be some other factor influencing the results. Anything which distracts a person can produce a situation where he cannot recall whether or not he has scaled or recorded a log. Nevertheless, I would not expect the Forest Service scalers to consistently scale fewer pieces because of interruptions. There is evidence that the work is being done in a casual manner and we should identify the cause and take corrective action."

Also, when the problem was raised with the Minister of Forests in early 1982, the Deputy Minister asked Assistant Deputy Minister MacPherson for an explanation, and Mr. MacPherson made the following comments:

> "Last year a serious scaling discrepancy was discovered at Shoal Island. Due to number of sorts and a high speed specialized processing - scaling method - 10% plus of logs passing through dry land sort were unscaled."

The fact that the scaling procedure was changed fairly rapidly once the extent of the problem became obvious also corroborates the view that there is general acceptance of the position that the scaling was deficient in significant aspects.

Compliance With Part 6 of the Forest Act:

An important implication of this deficiency is that the scaling procedure was such that it did not meet the requirements of Part 6 of the Forest Act in two respects: the scaling was not done according to prescribed procedures, and it did not allow an opportunity for a second scale.

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Mr. Campbell has pointed out that Section 74(1) requires that timber be scaled according to prescribed procedures. Those procedures are embodied in the Scaling Regulation, which clearly specifies that a number of measurements are to be made and recorded for each log (unless a sampling procedure had been approved, which was not the case at Shoal Island). It is apparent that a significant number of logs were not measured and their volume was not recorded, and thus the scaling was not done according to the procedures prescribed by the regulations.

Also, the scaling at Shoal Island did not meet the requirements of the Forest Act with respect to a second scale. As noted earlier, Section 77(1) requires the regional manager to have a second scale performed when requested to do so by the person who had the original scale performed, or by a person whose interests are affected by the original scale. The contractors, who are paid on the basis of the Forest Service scale, would clearly fit the description of parties whose interests would be affected by the scale.

However, it appears that there was never an opportunity for a second scale to be performed at Shoal Island. This lack of opportunity stems from two factors: first, scale returns were delivered a number of months after the scaling had taken place, by which time the logs could well be processed into lumber and/or moved to another location; and second, when the scaling operation was completed, the logs were moved into outflow booms according to sort code, making it virtually impossible to reassemble the original bundle.

Comments on Ministry file documents indicate that Ministry staff recognized this weakness. For example, in a March 15, 1982 memo to the Director of the Valuation Branch, Assistant Deputy Minister MacPherson made the following comments:

> "Section 77 of the Forest Act allows for a second scale. But it appears Shoal Island method of operation makes a second scale impossible - Do we require a change in system to guarantee the ability to have a second scale? Or do we require a change in the Forest Act?"

Also, in an April 2, 1982 memo, the Scaling Policy Forester explained the procedure that would have been necessary to provide a second scale at Shoal Island:

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> "A second scale can be made of the timber included in any one invoice providing the logs have not been manufactured but for the contractor the costs would be heavy as his timber will have been sorted and mixed with other timber in a number of booms. All booms would have to be dewatered, bundles broken and logs spread. The contractors' timber could not be identified if a log were not marked, or if two contractors used the same log mark."

In actual practice, this would require that all of the logs on that invoice be available. Given the fact that the timber would have been sorted into a number of outgoing booms, that some of those booms could have been towed to other locations, that some of the logs could have been manufactured, and that several months would elapse between scaling and receipt of invoices, there appears to be very little likelihood that all of the logs on an invoice would be available for a second scale.

I have also noted that the Ministry's internal report of May, 1983 indicates that the four invoices which were issued to BCFP in December 1981 were issued pursuant to Section 77 of the Forest Act. Section 77 describes procedures to be followed in the case of a request for a second scale, and therefore was not actually applicable to the situation. The three checks that were made were in fact types of check scales since they were done at the same time as the original scale, and certainly long before any invoice for the original scale had been issued. I would assume that if it had been possible to do a second scale, the Ministry would have followed that procedure, rather than doing a check scale and then invoicing on the basis of second scale procedures.

Applicability of Section 87 of the Forest Act:

The partial legal opinion provided by the Deputy Minister of Forests takes the position that timber is scaled when it has gone through the scaling process and a scale return has been provided. It further states that Section 87 was intended to cover the situation in which a volume of logs had been processed or exported without being scaled, and that it was not intended to cover a situation in which some logs had been missed during the scaling procedure.

This position differs from the opinion provided by Mr. Campbell. Mr. Campbell has advised me that if some logs were not scaled, then the requirements of Section 74(1) were not met, and such logs were not scaled within the meaning of the Forest Act. He has pointed out that neither the Forest Act nor the Scaling Regulations deem logs to have been scaled by virtue of the fact that other logs which were delivered to the scaling site at the same time were properly scaled. His conclusion is that

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Section 87 is applicable for the purpose of estimating the volume of timber delivered to, but unscaled at the dry land sort for the period commencing January 1, 1979.

It was on that date that Section 87 of the Forest Act became effective. There was no equivalent section in the previous version of the Forest Act. However, although the previous Act was silent on this point, I understand that Section 87 was simply the embodiment of the Ministry's actual practice prior to the coming into force of the "new" Act. That is, prior to 1979, when a situation occurred in which Crown timber was processed without being scaled, it was the Ministry's practice to estimate the volume of unscaled timber, apply the appropriate stumpage rate, and bill the licensee on the basis of the scale estimate.

Section 87 provides a legal remedy for estimating the volume of unscaled timber processed through Shoal Island after January 1, 1979. However, since prior to that it was the Ministry's practice to prepare estimates of unscaled timber, I believe the procedures described in Section 87 should also be applied to the Crown timber which was processed through Shoal Island prior to 1979.

Estimating the Unscaled Timber:

The internal report prepared by Ministry staff in May 1983 makes reference to possible difficulties in determining the volumes of timber which passed through Shoal Island unscaled. I recognize that the Ministry does not have data which would permit the calculation of the precise volume of timber which went unscaled, and I also recognize that Ministry staff and the contractors have produced different estimates of the unscaled timber.

The contractors believe that of the timber they delivered to Shoal Island, 226 064 cubic metres (13.7%) were not scaled. The T.M. Thomson report expressed confidence in the accuracy of the data from four of the six contractors, and was unable to confirm or reject the data provided for the remaining two contractors. T.M. Thomson calculated truck load averages for each contractor from 1975 to 1982, where available; this included the period before Shoal Island commenced operations, the period during which the original scaling procedures were in effect, and the period after the scaling procedure had been amended. The load averages before Shoal Island commenced operations and after the implementation of the amended scaling procedures, appear to be fairly consistent; however those for the intervening period are lower.

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On the other hand, the internal review undertaken by the Ministry appeared to acknowledge a somewhat lower volume. In a memo to Assistant Deputy Minister MacPherson, the Director of the Valuation Branch stated:

> "Our review indicated, on the basis of the best rationalization that we were able to make, a missed volume of 6.3% of the volume scaled for the contractors and time period involved.
>
> This works out to 85 000 m^3, the figure being approximate since all data has not yet been checked out."

I could find nothing on Ministry documents to support the 6.3%, or to explain how it was derived or what base was used to obtain an equivalent volume of 85 000 m^3. (The Thomson report shows volumes obtained from the Scale and Royalty accounts, the total of which is 1 426 815 m^3 for the period and contractors in question; 6.3% of this figure is 89 889 m^3). My investigator was advised by Ministry staff that the 6.3% was derived from the piece counts done in September, 1981. However, I would not consider this to be a good basis for an estimate since at that point the scalers knew they were being checked, and as the Superintendent of Scaling has pointed out, they "...certainly were doing their best to do an accurate scaling job".

The internal report does make reference to variations in load averages and to the 6% allowed for sinkage in the Thomson report. The variations in load averages cited in the report appear to be industry averages for coastal operations, and do not appear to recognize the extremely consistent data provided by at least some of the contractors. The 6% sinkage factor was intended to recognize the improved wood recovery which BCFP anticipated when scaling, sorting and storage was switched to the new dry land sort operation from the previous water operation. The 6% figure may be low or it may be high; but it seems logical that some such factor would have to be added to the pre-Shoal Island data to obtain a proper estimate.

I do not know what volume of timber passed through Shoal Island without being scaled; but I do know that Section 87 of the Forest Act makes reference to the "regional manager's estimate of the volume of the timber" (emphasis mine), and therefore clearly anticipates that actual volumes will not be available. The contractors have provided a lot of data from which an estimate can be derived; there may be certain points, such as the sinkage factor, which require further discussion, but given that a volume of timber has been missed, I believe that the Ministry has a responsibility to make the best estimate possible of the unscaled volume on the basis of the available data.

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I had also noted the comments on Ministry files to the effect that BCFP had advised Ministry staff that additional payments would not be made unless ordered by a court and that there was doubt that a court would support such action by the Ministry because of the circumstantial nature of the evidence. Mr. Campbell has advised me that there is precedent for the acceptance of circumstantial evidence in situations such as Shoal Island. He has provided me with a copy of a judgment in which the Court relied on discrepancies in piece counts and accepted expert testimony to rectify an erroneous scale. If the Ministry's refusal to implement Section 87 was at all the result of a belief that it would be unable to enforce its supplementary billings, perhaps this will serve to allay the Ministry's fear on that point.

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CONCLUSIONS

As a result of my investigation I have come to the following conclusions:

1. A volume of Crown timber was processed through Shoal Island during the 1978-1981 period without being scaled, and there is wide recognition of this fact within the Ministry.

2. This unscaled volume represents Crown timber delivered to BCFP for its use; but the Province was not paid stumpage for BCFP's use of the Crown timber, and the contractors were not paid for logging it.

3. The scaling procedures at Shoal Island did not conform to the requirements of the regulations, and did not allow an opportunity for a second scale to be performed; therefore the timber was not scaled as required by Part 6 of the Forest Act.

4. Section 87 of the Forest Act provides an appropriate remedy for situations in which timber has been processed without first being scaled under Part 6 of the Act. Section 87 would apply to timber processed through Shoal Island since 1979 and continuing until the procedures were changed.

5. Prior to the coming into force of Section 87, it was the Ministry's practice to prepare an estimate of any unscaled, processed timber and to bill on the basis of that estimate. This practice can be applied to the timber processed through Shoal Island prior to 1979.

6. There is data available which would permit the Ministry to develop a good estimate of the unscaled timber. The contractors have provided a significant amount of data on the volumes they delivered to Shoal Island; additionally, further information can be obtained from BCFP and from the Ministry's own files to prepare estimates of volumes logged by BCFP.

7. The Ministry's decision not to implement Section 87 in the Shoal Island situation has detrimentally affected the contractors and the revenue accruing to the Province; it is my conclusion that the decision is unjust.

The Ministry has a statutory responsibility to properly scale timber harvested from Crown land and to collect the royalties due the Province from that Crown timber. Undoubtedly, the Legislature intended that the Ministry exercise these responsibilities so that the public's interest in this valuable resource would be protected.

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In this case, it is clear that over a period of time and in one or more locations a significant volume of Crown timber was harvested without being scaled and without the corresponding royalties being collected. As a consequence of this, BCFP (and possibly other companies at other dry land sorts) have had the benefit of significant volumes of Crown timber without having to pay the Crown its fees for the use of that timber. While this no doubt assisted BCFP, I believe it incumbent upon the Ministry to take the necessary steps to ensure that the proper royalties are collected by the Province.

In addition to the detrimental effect on the public interest, the Ministry's failure to scale all timber processed through Shoal Island has also caused specific hardship for the contractors who logged the timber. The complainants had contracted with BCFP on the understanding that the scaling of the timber they harvested would be accurate and complete, and the prices to be paid were based on this understanding. As it is, timber was harvested for which the contractors have not been paid.

In conclusion, it appears to me most unjust that the contractors and the public (through lost stumpage fees) be expected to bear the loss which has directly resulted from the improper scaling procedures previously employed by the Ministry at Shoal Island.

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RECOMMENDATIONS

The scaling procedure at Shoal Island was established by the Ministry of Forests and implemented by its employees. It was deficient, and as a result, both the contractors and the public purse have suffered. Section 87, and the practice in place before the effective date of Section 87 provide a remedy by which the negative results of the Ministry's actions can be corrected. I consider it imperative that the Ministry take advantage of this remedy; specifically, I make the following recommendations:

1. that the Ministry of Forests prepare an estimate of the unscaled timber processed through Shoal Island during the period July 1978 to December 1981;

2. that the Ministry provide BCFP and the contractors with its estimate, and with information on the means by which the estimate was developed;

3. that the Ministry consider any representations received from the affected parties before finalizing its estimate; and

4. that the Ministry issue additional scale returns and invoices to BCFP on the basis of this estimate.

Karl A. Friedmann
Ombudsman

December 19, 1983

OWEN, BIRD

BARRISTERS & SOLICITORS

HON WALTER S OWEN, QC, CC, LL.D (1981)

JOHN I BIRD QC
WILLIAM E IRELAND
F MICHAEL P WARREN
ROBIN C MACFARLANE
MICHAEL J BIRD
TOBIN S ROBBINS
RALPH A DAVIS
GRETCHEN H CLEVELAND
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OUR FILE 5233

November 24th, 1983

Kyuquot Logging Ltd.
505 - 207 West Hastings Street
Vancouver, B.C.
V6B 1J5

Dear Sirs:

RE: Shoal Island

You have advised us there was a substantial underscale of logs at Shoal Island Dryland Sort of B.C. Forest Products Ltd. between 1978 and 1981. You drew this fact to the attention of the Ministry of Forestry which investigated the matter. In a letter from the Ministry of Forestry, the Hon. T. Waterland, dated August 2nd, 1983 he states:

> "The Attorney General has given legal advice that s. 87 of the Forest Act has no application to the situation at hand because a scale has taken place and only its accuracy is being questioned.
>
> Therefore I must advise that the official scale will stand and no further accounts will be issued."

The Minister's position seems to be that the Government has no legal means to rectify the injustice caused to both logging contractors and the public treasury, by the large underscale at Shoal Island.

You have asked for our opinion whether the Ministry of Forestry has any legal means open to it to rectify the underscale at Shoal Island.

The scaling of timber is governed by Part 6 of the Forest Act. Section 73(1)(b) specifically requires that timber cut from Crown land be scaled before it is manufactured into products, sold or removed from the Province. Section 74 states that the scaling shall be carried out according to the prescribed procedures.

The prescribed scaling procedures are contained in the Scaling Regulation, B.C. Reg. 563/78 as amended. According to s. 2 of the

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Regulation, the timber shall be scaled as soon as possible after it is cut. The specific procedures to be observed by a scaler, including the kind of measurements to be taken, are set forth in sections 5 and 6. Section 7 requires that either each piece of timber or a sample of timber be scaled.

From the foregoing, it will be seen that the two fundamental requirements for scaling under the Forest Act and Regulations are as follows:

1. All timber that is required to be scaled must be scaled;

2. The scaling must be conducted according to the statutory procedures.

Failure to observe these requirements is an offence under s. 159(a) of the Forest Act.

On the basis of the data which you have produced with respect to scaling at Shoal Island between mid-1978 and 1981, it is apparent that not all timber delivered to Shoal Island was scaled or was purported to be scaled. Many logs were missed because of the negligent procedures followed by the Government scalers and B.C. Forest Products. In addition, the scaling which was conducted did not conform to the procedures prescribed by statute.

The underscaling which occurred during this time period had a two-fold effect: the Crown was deprived of stumpage and royalties which would otherwise have been payable if proper scaling had been conducted; and the income of the contractors was reduced since they did not receive credit for all the timber they delivered to Shoal Island.

Under s. 77 of the Forest Act, it is possible for a person who either has had a scale performed or whose interest is affected by a scale (eg., a logging contractor) to require a second scale to check the accuracy of the first scale. The Scaling Regulation, s. 14, however, requires that the same timber be scaled. Because of the procedures utilized at Shoal Island, including the commingling of various truckload bundles and the delivery of timber, both scaled and unscaled, to the sawmill prior to receipt of the first scale returns, it was impossible to have a second scale performed in accordance with the statutory procedures. The possibility for rectification provided by s. 77 was not available to either the Crown or to the contractors.

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Thus the statute recognizes that a first scale may be inaccurate and expressly provides one remedy to correct the inaccuracy - namely, a second scale.

It would be highly anomalous if the effect of a second scale being impossible were to render immutable an inaccurate first scale. In our opinion that is not the effect of the statute. Except as noted below, there is nothing in the Act or Regulation which stipulates that a scale return is conclusive for all purposes. Under s. 77(2)(b)(i), an original scale return will govern for all purposes only where a second scale has been performed and the second scale return "does not vary from the original scale return by more than the extent prescribed in the Regulations . . ." Therefore, it follows that where a second scale is impossible, an original scale return is not conclusive proof of the facts stated therein.

The inability to conduct a second scale does create certain problems of proof. However, where the inaccuracy of the first scale can be proven by other means, it is our view that the first scale can be challenged. In this case you have conclusive evidence of the inaccuracy of the first scales at Shoal Island.

In focusing in on the legal recourse available to the Ministry of Forestry for recovering royalties or stumpage on timber which was not scaled in the first scale, we believe that there are two alternate courses of action available.

Firstly, the Government, using the evidence you have gathered, could simply issue a revised scale correcting the first scale. This would not be a "second scale" within the meaning of s. 77 of the Forest Act as it would obviously not be an actual scale conducted on the original timber. It would however be a correction to the original scale. Nothing in the statute expressly allows or prohibits the correction of the original scale in this way but, as pointed out above, neither does the statute make the original scale conclusive where a second scale cannot be conducted. In order to correct the great injustice that would be perpetrated on both the Government and the contractors should the erroneous first scale be allowed to stand, we believe the courts would recognize the right to correct the first scale when conclusive evidence is produced showing it to be erroneous.

The revised scale would then be the basis for new royalty and/or stumpage to be assessed under Part 7 of the Forest Act. It would also be the basis for proper payment to the logging contractors.

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Alternatively, it can be argued that the so-called "scale" which was conducted at Shoal Island between mid-1978 and 1981 was not a "scale" within the meaning of Part 6 of the Forest Act. We have already mentioned that the scaling procedures did not conform to statutory requirements. The result was that a very substantial percentage of the logs were not scaled at all. In these circumstances it can be forcefully argued that there was not a "scaling under Part 6" with respect to the missing pieces. In these circumstances we believe that s. 87 could be utilized. It provides:

> "87. Where Crown timber on which royalty or stumpage is payable is processed, sold or removed from the Province without first being scaled under Part 6, the amount of royalty or stumpage payable shall be calculated by multiplying
>
> (a) the regional manager's estimate of the volume of the timber; by
>
> (b) the rate of royalty or stumpage, as the case may be, that the regional manager considers would have applied if the timber had been scaled under Part 6."

In this case a very large number of logs were "processed, sold or removed from the Province" which were not included in the scales performed under Part 6. It is true that a scale was performed and was intended to cover all the logs but it failed to do so over an extended period of time. It is not a case of minor errors from time to time or slight differences in approach of individual scalers. These are expected. The irregularities at Shoal Island were so gross as to give rise to the argument that no proper scale was performed.

Once the calculations permitted by s. 87 have been made, the Crown can recover from the company the royalty or stumpage which would have been payable if all timber at Shoal Island had been scaled in the first instance and scaled properly. Similarly, the regional manager's estimate of timber volume could form a basis for calculating the income which ought to have been paid to the contractors.

In conclusion, we should point out that in one sense the Government is the author of its own misfortune in terms of missed stumpage and royalties. In large part the fault lies with the Government scalers, although B.C. Forest Products is also at fault for the underscale. It is one thing to say that the Government

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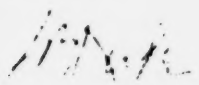
should not now go back and recover royalties and stumpage missed because of its own errors. It is quite another thing to contend that the Government should do nothing to assist the logging contractors, who are completely innocent. They were the ones who brought the underscale to the Government's attention which resulted in the procedures being corrected. They were the ones who have suffered the substantial loss. In our view the Government should certainly take steps to issue a revised scale to serve as the basis for payment to the logging contractors or proceed under s. 87. In our view the Government is legally liable to the logging contractors for the shortfall that they have suffered as a result of the Government's own mistakes.

Yours very truly,

OWEN, BIRD



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February 22, 1984

The Honourable K. Walter Davidson
Speaker of the Legislative Assembly
Province of British Columbia
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Victoria, B.C.
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Mr. Speaker:

I have the honour to submit herewith an addendum to my Special Report No. 7 to the Legislative Assembly of British Columbia, the Shoal Island Case.

This addendum seeks to clarify a comment made on page 28 of my Special Report.

Respectfully yours,

Karl A. Friedmann
Ombudsman

Ombudsman of British Columbia

Addendum to Special Report No. 7
to the Legislative Assembly of British Columbia

On page 28 of my Special Report No. 7, I made the following comment:

> "Documents on the Ministry's files indicate that in March, 1983, the Minister of Forests asked one of my complainants to get the Ombudsman out of the investigation".

My comment was based in part on a letter found on the Ministry's files. The letter was dated March 18, 1983, and was written to Mr. Waterland by Mr. Ian Mahood, one of the complainants. The letter, marked 'Personal and Confidential' reads in part:

> "Dear Tom:
>
> To demonstrate facts confirmed by 1982 scaling, I attach "living colour".
>
> I am on the same side as you politically. I am asked to get the Ombudsman out of the investigation and control contractors until corrective action is in place.
>
> You can solve this to your advantage by the following actions..." [The letter then outlines a proposed resolution].

As Ombudsman, I am concerned whenever there is a suggestion that an authority might attempt to put pressure upon a complainant to withdraw a complaint made to my office. For this reason my investigator contacted Mr. Mahood at the time the above letter came to our attention (prior to September, 1983) and asked if such an attempt had been made. Mr. Mahood confirmed that he had had discussions with Mr. Waterland and that he had been asked in those discussions to get the Ombudsman out of the investigation. Thus the comment on page 28 of my Special Report.

Subsequent to the tabling of my Special Report, in response to questions in the House, Mr. Waterland denied that he had ever made any effort to deter my investigation. Because of this, I re-examined the documents in question and obtained additional information from Mr. Mahood. Mr. Mahood has advised me now that prior to the writing of that March 18, 1983 letter to Mr. Waterland, he had had separate discussions with Mr. Waterland, and with Mr. Ray Williston (formerly Minister of Forests, currently Chairman and President of B.C. Cellulose Company), and that it was actually Mr. Williston who had suggested that Mr. Mahood should get the Ombudsman out of the investigation. My solicitor has today contacted Mr. Williston and he has confirmed that he made the suggestion in the belief that the matter could be resolved internally.

In short, the information initially obtained from Mr. Mahood indicated that there had been some attempt by Mr. Waterland to eliminate my involvement in the investigation, it is now clear that the suggestion did not come from Mr. Waterland. I realize that my comment (on page 28 of my Special Report No. 7) left the Minister open to charges of impropriety both in the House and before the public. I now bring this additional information to the attention of the Legislative Assembly in an effort to correct the erroneous information. I have expressed to Mr. Waterland my sincere regret about the inconvenience and embarrassment this comment has undoubtedly caused him.

February 22, 1984

Karl A. Friedmann

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PRESS RELEASE

Issued February 23, 1984 for immediate release.

Statement by the Ombudsman

Re: Shoal Island Special Report

I have been accused by the Attorney General of British Columbia in the Legislative Assembly to have shown "poor judgment and inappropriate conduct" in tabling a Report with the Legislative Assembly. Outside the House the Attorney General referred to my actions as "highly irresponsible". I cannot accept either of those accusations and will state briefly my reasons.

In December of 1982 two logging contractors complained to me about the Ministry of Forests' scaling procedures at Shoal Island. They were later joined by four other logging contractors all of whom were or are logging under contract with B.C. Forest Products Ltd. (BCFP). The complaint as I stated it to the Ministry was "that the Ministry of Forests failed in its duty to properly scale timber with the result that the contractors have been significantly underpaid for their logging operations".

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My investigation of this complaint was completed on December 19, 1983 and the Ministry was advised of my findings that the Ministry's scaling procedures were deficient in a number of ways and as a result during a 3 1/2 year period a volume of Crown timber was processed through the Shoal Island dry land sort without being scaled. As a result both contractors and the Province have suffered. I recommended that section 87 of the Forest Act be utilized by the Ministry to estimate the volume of unscaled timber and invoice the licensee accordingly. Section 87 would allow the Ministry to estimate the value of unscaled timber in cases where it may have been processed or exported without first being scaled. It was my finding that the refusal of the Ministry to apply Section 87 was unjust and that it should take immediate action to correct the injustice. This was the full extent of my investigation and recommendations. The Ministry did not accept my recommendations. Therefore, pursuant to Section 24(1) of the Ombudsman Act I submitted a report of the matter to the Lieutenant Governor in Council on January 11, 1984, pointing out the urgency of the matter and requesting a response as soon as possible. After submission of the report to Cabinet a number of inquiries were made to the Secretary to Cabinet asking when I might receive a response. On February 13, 1984 he was advised that I planned to make a report to the Legislative Assembly very soon.

On February 15, 1984 I received a letter from the Deputy Attorney General advising me that the RCMP were asked to "examine the matter to determine whether any criminal conduct might be present". This request to the RCMP

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was apparently based on a letter "from one of those to whom you wrote on December 19, 1983". The Deputy's letter indicated that as soon as the examination was concluded the Lieutenant Governor in Council would be advised and I would then be contacted in response to my January 11th letter subject to "any continuing limitation that criminal proceedings might for the time being impose".

On February 16th I faced a difficult decision: to proceed with my report to the Legislative Assembly as anticipated and as communicated to the Cabinet, or to postpone such a report for months or possibly years. The information put before me by the Deputy Attorney General was extremely vague. In effect I was given virtually no information to assist me in making my decision.

There was no allegation of criminal conduct specified.

There was no accused person or persons, not even a suspect.

There did not even appear to be a criminal investigation; only an "examination" that might or might not lead to a criminal investigation.

There was no indication how long this process might take.

The Deputy Attorney General did not suggest that an Ombudsman report would jeopardize the RCMP examination.

Against this paucity of information I had to weigh my obligations to the complainants and the right of the Legislative Assembly to be informed of this substantiated but unrectified grievance.

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I have had several occasions to address allegations of criminal conduct. As the Attorney General is fully aware I have referred such allegations to his Ministry and suspended my investigations in the meantime.

No such allegations came to my attention during the entire length of my investigation of the Shoal Island complaint. I made no allegation in my report of misconduct by any official or any other persons. I merely state, as the Attorney General knows, that administrative procedures (scaling procedures) used by the Ministry of Forests were inadequate and that the Ministry should utilize the statutory provisions available to it to correct these deficiencies.

It will be useful to remember the words of Chief Justice Milvain of the Alberta Supreme Court:

> "... the ombudsman can bring to the legislature his observations on the misworking of administrative legislation. He can also focus the light of publicity on his concern as to injustices and needed change. It must, of course, be remembered that the ombudsman is also a fallible human being and not necessarily right. However, he can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds. If his scrutiny and observations are well-founded, corrective measures can be taken in due democratic process, if not, no harm can be done in looking at that which is good."*

*(Re Ombudsman Act (1970), 72 W.W.R. 176 at page 192)

POOR

QUALITY

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